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AN
ABRIDGMENT
OF
THE AMERICAN LAW
OF
REAL PROPERTY.

By FRANCIS HILLIARD,
COUNSELLOR AT LAW.

IN TWO VOLUMES.

VOL. I.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.

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YVABU GROMATO

PREFACE.

THE following work is designed to be for the American lawyer what Cruise's Digest hitherto has been for him, and still continues to be for the English lawyer. Cruise, although undoubtedly one of the best elementary law books that England has produced, and although hitherto an indispensable part of the library of an American practitioner, has been extensively used in this country, not because it is the book *which is wanted*, but because it is the only one, in any degree answering the purpose, *which could be had*. It is believed that the present work is the first attempt to compile a book, upon the important subject of Real Property, corresponding in extent and general plan with the English text-book, and at the same time thoroughly American in the materials of which it is composed. It may be stated in few words, what are the chief characteristics which distinguish this work as strictly American, from the popular Abridgment above referred to.

1. Cruise's Digest contains a large amount of matter which is of no practical use whatsoever to the American lawyer. It treats at great length of subjects, which either never existed, or have become entirely obsolete in this country. That an occasional illustration or analogy of some value, may be derived from principles which have no longer any direct practical applicability, is not denied. But it is

obvious, that portions of the law, which are useful only in this incidental way, ought to be treated with proportional brevity, and not with the minuteness of detail which is demanded in relation to topics in their nature of immediate practical use. Now, as an example of the character of Cruise's Digest in this particular, it may be mentioned, that in this work the three titles of *Advowson*, *Tithes* and *Dignities*, occupy 150 closely printed pages; *Fine, Recovery* and *Alienation by Custom*, about 400 pages; *Copyhold*, 60 pages, &c. &c. It is not too much to say, that no such titles as these are known to *American law*. Upon a strictly scientific American plan, they would find no place in a work upon the *American Law of Real Estate*. But supposing them, though now obsolete or never adopted in this country, to be so closely connected with other titles which are in force, that they cannot with propriety be wholly passed over; still there is no propriety in filling up a large space with the intricate decisions, formal classifications, and nice distinctions, which appertain to them as subsisting branches of the English law. It is certainly within bounds to say, that in purchasing Cruise for the sake of the matter *which he does want*, the American lawyer must pay one third of his money for matter *which he does not want*.

2. While Cruise's Digest is thus ill-adapted to the American lawyer by reason of *surplusage* or *excess*, its *defectiveness* is equally striking and apparent. It is obvious that in the course of forty years, an immense mass of decisions must have been accumulating in the United States, upon subjects pertaining to Real Estate. Even where these substantially corroborate the principles of the English law, they are of paramount importance to the American lawyer.

And for the innumerable modifications with which, in the various states, they qualify those principles, they are still more indispensable. The present work proceeds upon the plan of *collecting the American cases*, not in the way of merely stating the points decided or copying the marginal notes, but by summarily giving the facts, and often an abstract of the opinion of the Court, either in its own language or otherwise. It is believed—without any accurate enumeration, however—that two thirds of the cases cited in this work are American cases; while at the same time few or none of the English decisions are omitted.

3. The remaining, and most important characteristic of the present work, as an American work, is, that it gives a view of the *changes made in this country in the English law of Real Estate*. Every lawyer is aware that these changes are vastly numerous and important; but perhaps few would suppose the number or importance of them to be such, as a careful inquiry shows it to be. Take, for an example, such titles as *Descent, Estate Tail, Dower, Mortgage*; it is not too much to say, that upon these subjects *the English law is not our law*, but that the American statutes have built up a *new system* for the American States. It is believed, that in the preparation of the present work, the statutes of all the States have been faithfully examined; and that all their provisions, bearing upon the subject of Real Property, will be found stated correctly, and with sufficient minuteness to make the work a safe and satisfactory guide. Great care has been used, to avoid giving the present work anything of a *local character*; and to make it alike applicable and useful *in every State of the Union*, where the common law of England is adopted. For an obvious reason, the State of

Louisiana has been omitted. Should it be deemed expedient, the Law of Real Property in this State may be hereafter noticed in an Appendix.

In the multitude of Statutes of the several States which the author has examined, it would be folly to pretend that none have escaped his notice, pertaining to the subjects treated of in this book. He may, however, be permitted to claim the merit of a careful and thorough investigation of all, or nearly all the printed Laws of each State, so far as the Indexes, Contents, and Alphabetical arrangements have afforded him any aid in making it. It is proposed at the end of the second volume, to form an *Addenda* of such statutory provisions as may chance to have been overlooked, and those passed since the commencement of the work. The author will be greatly indebted to gentlemen in any State, who will suggest by letter any required alterations or additions, which may occur to them in the perusal of these volumes, with respect to the peculiar laws of their own States.

With the consciousness of having assumed a great undertaking, to which he is incompetent to do full justice, but at the same time of unintermitted labor and strict fidelity in accomplishing it according to his ability, the author submits the work to the candid notice of the profession.

Boston, *July* 1, 1838.

ERRATA.

Page 14—12th line from bottom, for <i>fourth</i>		read <i>third</i> .
112—17th	" " for <i>hair</i>	" <i>bar</i> .
122—3d	" " for 103	" 101.
136—26th	" " dele <i>made</i> .	
202—2d	" " for <i>on</i>	" <i>or</i> .
224—15th	" " for <i>in</i>	" <i>a</i> .
265—2d	" " top, for <i>B</i>	" <i>the son</i> .
268—11th	" " bottom, for <i>grantee</i>	" <i>grantor</i> .
305—14th	" " " for <i>A</i>	" <i>C</i> .
306—8th	" " top for <i>of A</i>	" <i>of B</i> .
311—12th	" " bottom, dele 10, &c.	
331—4th	" " " for 202	" 302
344—5th	" " " for <i>demanded</i> .	" <i>demanded; C</i> .
345—11th	" " " for 43	" 43.
389—11th	" " dele <i>that</i> .	
426—12th & 13th	" " for <i>to guard</i>	" <i>of guarding</i> .

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ABRIDGMENT

OF THE

AMERICAN LAW OF REAL PROPERTY.

CHAPTER I.

REAL PROPERTY IN GENERAL.

- | | |
|--|------------------------------------|
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1. REAL property, in the technical phraseology of the law, consists of *lands, tenements and hereditaments*. The first of these terms is the least comprehensive, including only *corporeal* or *tangible* property, while the two last embrace also incorporeal. Thus a rent or right of common, though not *land*, is still real property, being both a *tenement* and *hereditament*. The term *hereditament*, which is the most comprehensive of the three, besides including the others, applies also even to articles of personal property, provided they are such as *pass to the heir* and not to the executor; as, for instance, to the *condition in a bond*.¹ So the *visitatorial power*, vested in the visitors of a corporation, has been termed an hereditament. So also a *land-warrant*.²

¹ Co. Lit. 6 a. 1 Cruise, 37. 2 Black. 17. 5 Conn. 518.

² 1 Sumn. 301. 4 Yerg. 94.

2. In England, the most frequent example of a personal hereditament is an *heir-loom*. Heir-loom is certain chattels that accompany the inheritance; such as deer in a park, doves in a dove-house, or the ancient jewels of the crown.¹ It has been suggested that nothing is strictly an *heir-loom*, which passes by the general law and not by special custom. The instances mentioned are said to be merely in the nature of heir-loom.²

3. In the United States, *heir-loom*s, as such, are for the most part unknown. They are however recognised by the statute law of Maryland,³ and excepted from the general disposition of personal property upon the death of the owner. And the principle applies to *title-deeds*,* which Lord Coke calls "the sinews of the inheritance," and to the keys of a house—both of which undoubtedly pass with the land to which they pertain.† So also to family pictures.⁴ In those States where slavery is known, it would seem that the transmission of *slaves* is founded upon a somewhat similar principle. In Virginia, Missouri and Maryland, slaves are either declared by statute to be personal estate or treated as such.⁵ In Kentucky, on the contrary, they are regarded as real estate.⁶ But whether personal or real technically speaking, it is the almost universal practice to treat them, in many important particulars, such as dower, or the formalities of transfer by deed or execution, like real property; or at least to place them on an intermediate ground between lands and chattels.

4. "Lands, tenements and hereditaments," is the phrase commonly used in the American statute law, to denote real estate. But in Massachusetts it is provided, that the words "land" or "lands" and "real estate," when used in a statute, shall include "lands, tenements and hereditaments and all rights thereto and interests therein," unless the Legislature manifestly intend otherwise. And in Missouri, *real estate*, when spoken of in the statute concerning executions, is declared to mean lands, tenements, &c., and in the statute relating to conveyances, to include chattels real.⁷

5. *Lands, tenements and hereditaments*, have been held to include a reversion expectant upon a *life estate*, and also equitable estates.⁸

6. *Water* is neither *land* nor a *tenement*; and is not demandable

¹ 1 Cruise, 38. Co. Lit. 9 a, n. 1.

² Amos on Fix. 161 & seq.

³ Anthon's Shep. 428.

⁴ Liford's case, 11 Co. 50—an interesting and valuable case.

⁵ Anth. Shep. 428, 494. Misso. St. 588.

⁶ Smiley v. Smiley, 1 Dana, 94. 1 Ky. Rev. L. 566.

⁷ Mass. Rev. St. 60. Ib. 413. Misso. St. 124, 262.

⁸ Cook v. Hammond, 4 Mas. 488. Dunlap v. Gibbs, 4 Yerg. 94 (see 7 Br. P. C. 607, 2 B. & R. 247, 8 T. R. 503.)

* It will be seen, hereafter, that important questions may arise between parties holding distinct interests in the same land—as, for instance, tenant for life and the owner in fee, or feoffee and cestui que use—in regard to the possession of the title-deeds.

† See infra—Fixtures.

in a suit, except as *so many acres of land covered with water*. It is a movable, wandering thing, and must, of necessity, continue common by the law of nature. The air which hovers over one's land and the light which shines upon it, are as much land as water is.¹

7. It will be seen hereafter, that the thing which is the subject of ownership, though in its nature real, may be owned in such a way as to constitute a chattel interest or personal estate. Thus *an estate for years* in land is personal property. So is every other estate less than *freehold*. The terms real estate and personal estate, therefore, denote sometimes the *nature of the property* and sometimes the *particular interest in that property*. The former is the popular and the latter the technical use of those expressions. In conformity with the latter, *things real* are said to be "permanent as to place and perpetual as to duration."² The *real estate* required to gain a settlement has been held to mean a freehold interest either rightful or wrongful.³

8. *Land* includes not only the ground or soil, but every thing attached to it above or below, whether by the course of nature, as trees, herbage, mines and water, or by the hand of man, as houses. The legal maxim is, "*cujus est solum, ejus est usque and cœlum*." Hence, if a man devises a lot of land having a building upon it, the building will pass with the land without being named, even though other buildings are named, in the devise. But it is usual to insert the clause, "with all the buildings thereon."⁴

9. A man conveys to A, his daughter, for the consideration of love and affection, a lot of land with *one half of the buildings thereon*. The same day he conveys to B, for the consideration of £300, one half of the buildings standing on the land *this day conveyed to A*. There was nothing but this last clause to show which was the prior deed. Held, inasmuch as the time, person, consideration, subject and purpose of the two deeds were different, and as they were not given in pursuance of any joint contract, one could not qualify the effect of the other, but A took the whole land and buildings and B took nothing. It might have been otherwise had both deeds been delivered simultaneously.⁵

10. The rule above-mentioned is the general principle of law; but it is subject to many qualifications or exceptions which deserve to be distinctly considered. I propose, therefore, to state the various cases, in which movable things, connected with or attached to land, are subject to a peculiar ownership, and the respective rules of law applicable to those cases.

¹ Mitchell v. Warner, 5 Conn. 497. Co. Litt. 4 a.

² Charlestown v. Ackworth, 1 N. H. 62.

³ 14 H. 8, fol. 12. Com. Dig. Grant E 3, Co. Litt 4 a.

⁴ Isham v. Morgan, 9 Conn. 374.

⁵ Williams J. dissented. This case probably carries the principle stated in the text to as great a length as any one to be found in the books.

² 1 Swift, 73.

11. It was anciently held, that there could be no freehold estate in the chamber of a house, because it must fail with the foundation ; and therefore that it would pass without livery. But it seems to be now settled otherwise. Ejectment will lie for a house without any land. And where the chamber belongs to one person, and the rest of the house with the land to another, the two estates are regarded in law as separate but adjoining dwelling-houses.¹ But the lease even of the cellar and lower room of a building of several stories, passes no interest in the land. Upon the destruction of the building, the whole right of the lessee is gone. It would be so with the lease of a cave.²

12. A *pew* in a meeting-house is in general deemed real estate. In England,³ the right to a pew is a *franchise*, depending either on a grant from the ordinary or on prescription. In Maine and Connecticut,⁴ pews are declared by statute to be real estate. So in Massachusetts,⁵ except in Boston, where they are treated as personal property. In New Hampshire,⁶ they are personal estate. In New York,⁷ the precise nature of this kind of property has been a subject of frequent discussion. It is held to be such an *interest in real estate* as comes within the statute of frauds, though the contract relate to a meeting-house not yet erected. But a statute requiring authority from the chancellor to empower a religious corporation to sell its *real estate*, was held not applicable to a sale of pews.⁸ The property in a pew, whether the owner be a member of the society or not, is not absolute, but qualified and usufructuary ; an exclusive right to occupy a certain part of the meeting-house for the purpose of attending public worship and no other, and is necessarily subject to the right in the parish or town to remove, take down, repair, &c. unless these acts be done wantonly. In Massachusetts, if the taking down of a meeting-house is *necessary*, the parish is not bound to indemnify the pew-holders ; if merely *expedient*, it is bound to indemnify them according to an appraisement.⁹

13. If one man erect buildings upon the land of another, voluntarily and without any contract, they become a part of the land, and the former has no right to remove them.

14. A husband erected a dwelling-house and joiner's shop upon land belonging to his wife, and died. Held, as no binding contract,

¹ Bro. Abr. Demand, 20, Co. Lit. 48 b. Otis v. Smith, 9 Pick. 297. Loring v. Bacon, 4 Mass. 575. 6 N. H. 555.

² Winton v. Cornish, 5 Ohio, 478.

³ 2 Bl. Com. 428.

⁴ 1 Smith's St. 145. Conn. L. 432.

⁵ Bates v. Sparrel, 10 Mass. 323. Rev. St. Mass. 413.

⁶ N. H. L. 186.

⁷ Elder v. Rouse, 15 Wend. 218. Trustees, &c. v. Bigelow, 16 Ib. 28.

⁸ Freleigh v. Platt, 5 Cow. 494.

⁹ Gay v. Baker, 17 Mass. 438. Howard v. 1st Parish, &c. 7 Pick. 138. Mass. Rev. St. 205. Fisher v. Glover, 4 N. H. 180. Freleigh v. Platt, 5 Cow. 494. Price v. Methodist, &c. 4 Ohio, 515.

in regard to such erection, could have been made with the wife during coverture, the buildings belonged to her, and could not be applied to payment of his debts.¹

15. So if one man take another's timber wrongfully, and use it in erecting or repairing buildings upon his own land, it becomes his property.²

16. On the other hand, there are many cases, where one man may own, as *personal property*, a building erected upon the land of another.³

17. A son, by permission, erected a house upon land of his father, under the mutual expectation that the land would be devised to the son, but with no agreement that the father should own the house or be accountable for its value. Held, the house belonged to the son as *personal property*.⁴

18. A town-house was built on land of the town, under a contract with the builder that the town should occupy a part of it at a certain rent, and have the right to purchase the house at an appraised value. Held, the house belonged to the builder as *personal property*.⁵

19. A bathing-house was erected by an individual on piles driven into the bed of a navigable river below low water mark, and afterwards mortgaged by him. Held, as he had no interest in the soil, the building was a chattel, and no equity of redemption remained in him, liable to be taken on execution.⁶

20. But a building so erected may be sold on execution as *personal property*, and the purchaser may legally enter on the land to remove it. The occupant has the right of passing over the close of the owner of the land to and from the highway.⁷

21. Such building will pass by a bill of sale, but cannot be extended upon, or recovered in a real action. Trover will lie for it, as for other chattels. But it may be validly attached, like real estate, without taking actual possession.⁸

22. The owner of the land will not gain a title to the building merely by a neglect on the part of the owner of the latter to occupy or claim it.

23. A erected a saw-mill on the land of B, with his permission. The building was sold to C upon an execution against A, and B afterwards sold the land to D. The building remained vacant three years, and D made no objection to its being on the land. Held, the purchaser of the building had not waived his right to it.⁹

24. Where one in possession of land *bona fide* as his own has

¹ Washburn v. Sproat, 16 Mass. 449.

² 2 Fairf. 371, 3, 162, 243.

³ Ashmun v. Williams, 8 Pick. 402.

⁷ Doty v. Gorham, 5 Pick. 487.

⁸ Aldrich v. Parsons, 6 N. H. 555. 2 Fairf. 371. 8 Pick. 402. (See also 1 Brod. & B. 506.)

⁹ Russell v. Richards, 2 Fairf. 371. (See Harris v. Gillingham, 6 N. H. 2.)

⁵ Amos on Fix. 9 n. a.

⁴ Wells v. Banister, 4 Mass. 514.

⁶ Marcy v. Darling, 8 Pick. 283.

erected buildings upon it; he or his grantee may remove them without incurring any liability to the true owner of the land.¹ *

25. There are other things, connected with or attached to land, and therefore *prima facie* subject to the same ownership with the land, which by special acts or agreements may be, in point of title, separated from it.

26. In England, the crown, in a grant of land, may reserve all mines. But this gives no right to the crown to enter in search of mines, but only, after they are opened, to restrain the tenant from working them, or work them itself, or license others to do it.² The United States, in the sale of the public lands, reserve all salt springs and lead mines.³

27. A similar principle is often applicable to *growing trees*, which, though standing upon and rooted in the soil, may be the subject of a distinct ownership. But if the limbs of a tree overhang another man's ground, they still belong to the owner of the root. If the root extends into the ground of a neighboring owner, he is a tenant in common of the tree with the planter.⁴

28. It is said, that a grant or devise of an interest in *growing wood*, is (that of) an interest in the soil itself. But it is otherwise with a grant or reservation of *trees*.⁵

29. Where A conveyed to B a lot of land in fee, and B on the same day reconveyed to A his heirs and assigns all the trees and timber standing and growing on said land forever, with free liberty for them to cut and carry away said trees and timber at all times at their pleasure forever; held, A retained an inheritance in the trees and timber, with an exclusive interest in the soil, so far as it might be necessary for the support and nourishment of the trees.⁶

30. It was anciently held, that trees, like the chamber of a house, could not be the subject of a freehold estate.⁷ But it has since been settled, that trees reserved from a conveyance for life are not personal estate, but real, and will therefore pass, without being named, with a subsequent grant of the reversion, notwithstanding such grant expressly refers to the reversion of that which was previously leased.⁸ But it is said that a grant of trees passes them to the grantee as chattels.⁹

¹ Wickliffe v. Clay, 1 Dana, 591.

² Lyddel v. Weston, 2 Atk. 19.

³ Walk. Intro. 43.

⁴ 1 Swift's Dig. 104, Waterman v. Soper, 1 Ld. Ray. 737.

⁵ Wright v. Barrett, 13 Pick. 44. Liford's case, 11 Co. 50. (See Com. Dig. Biens G. 2.)

⁶ Clap v. Draper, 4 Mass. 266. (Rehoboth v. Seekonk, 1 Pick. 224.)

⁷ Bro. Abr. Demand, 20.

⁸ Liford's case, 11 Co. 47.

⁹ Stukely v. Butler, Wms. Hobart, 310.

* This decision was made in Kentucky. The rights of settlers upon the western lands, which perhaps constitute an exception to the general rules of law on this subject, will be considered hereafter.

31. It has been held in New Hampshire, that a sale of growing trees, to be taken within a certain time, is within the statute of frauds, and must be in writing.¹

32. From what has been said, it may be seen that growing trees, although they may be disannexed from the soil by some act of the owner, are still, independently of any such act, a part of the soil, and owned accordingly. The same rule seems, in general, applicable to other vegetable productions. *Prima facie* they belong to the soil, but may be separated from it by some special transfer.

33. It is to be observed, however, that corn, or any other product of the soil raised annually by labor and cultivation, when ripe, is *personal estate*, may in general be seized or sold on execution as such, and passes to the executor.²

34. But, by statutes, in Kentucky, a crop shall not be levied upon, excepting corn after October 1, while growing. In Alabama, not till gathered. In Tennessee, not before November 15, except for rent, or where the tenant has absconded and left the country. In Kentucky, the growing crop will pass with the land, where the latter is sold on execution.³

35. It has been held, in England, that if a crop is mature—as for instance, a crop of potatoes—the sale of it in the ground, to be gathered immediately, is not within the statute of frauds; that the ground is a *mere warehouse*, till the crop can be removed. It would be otherwise if the potatoes were still growing.⁴ It is remarked by Chief J. Savage, that the English cases on this subject seem not quite consistent.⁵

36. If the owner of land sell the crop upon it by a parol contract, and afterwards convey the land to another purchaser, the crop does not pass to the latter. But a parol reservation of such crop to the grantor himself is void.⁶

37. In this connection may properly be considered the subject of *emblemments*.

38. *Emblemments*—from the French word *embleer*, to sow—are the *crops growing upon land*. The word, however, is generally used in law, to denote crops which are claimed by some person other than the general owner of the land, as incident to a particular estate therein.

39. *Emblemments* include only such vegetables as yield an annual profit, and are raised by annual expense and labor, or “great manurance and industry,”—such as grain; but not fruits, grass, &c., though

¹ Putney v. Day, 6 N. H. 430. (See Bostwick v. Leach, 3 Day, 476.)

² Penhallow v. Dwight, 7 Mass. 34. (See ex parte Bignold, Desc. & Ch. 398.)

³ 1 Ky. Rev. L. 657. Alab. L. 319. Ten. St. 1833, c. 20.

⁴ Parker v. Staniland, 11 E. 362.

⁵ 9 Cow. 42. (See Carrington v. Roots, 2 M. & Wels. 248.)

⁶ Austin v. Sawyer, 9 Cow. 89. (But see 6 John. 5.)

annual, because they are spontaneous. And even though grass be improved by labor, as by trenching or sowing hay-seed, it is not a subject of emblements. Otherwise with *hops*, though growing on ancient roots; and the artificial grasses, as *clover*, *saint-foin*, &c.¹

40. The doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement.²

41. Where a tenant for life dies before harvest time, his executors shall have the crops then growing, as a return for his labor and expense in tilling the ground.³

42. Where the estate is terminated in any other way than by his death, either by act of God or act of law, the tenant himself has the emblements. But not if he terminates it by his own act.⁴

43. Thus, where one is tenant *pour autre vie*, and the *cestui que vie* dies before harvest, the former shall have emblements. So if an estate be made to husband and wife during coverture (which is a life estate), and they are afterwards divorced *causa præcontractus*, he shall have emblements; because the divorce, although founded on the application of a party, is itself the act of the law. But if a woman, tenant during widowhood, marries again; or if a tenant forfeits by breach of condition; they have no emblements, because the estate is determined by their own acts.⁵ So, where a parson terminates his estate by voluntary resignation, he has no emblements.⁶

44. The right to emblements being founded upon the supposition of labor and expense incurred by the tenant, they are not allowed where this reason is wanting.⁷

45. Thus, if A sows corn, and then conveys the land to B, remainder to C, upon B's death before harvest, C takes the crop.⁸

46. So where the tenant dies before sowing, though after having prepared the ground for seed.⁹

47. Hence an agreement to allow a tenant "for preparing the ground for seed, and for any other extra labor," applies to the clearing, manuring and ploughing of the land, and does not interfere with his implied right to emblements.¹⁰

48. The executor of a deceased joint tenant cannot claim emblements, such tenant having had no *exclusive* title to the land.¹¹

49. At common law, a dowress was not entitled to emblements, the land being often sown when she came into possession of it after the husband's death. But by Stat. of Merton, 20 Hen. 3, ch. 2,

¹ Co. Lit. 55, b. and n. 2. Com. Dig. Biens G. 1. Cro. Car. 515. 1 Rolle's Abr. 728. Hob. 132.

² Stewart v. Doughty, 9 Johns. 112.

³ 1 Cruise, 80. ⁴ Ib.

⁵ Co. Lit. 55, b. Com. Dig. Biens, G. 2.

⁶ Bulwer v. Bulwer, 2 Barn. & Al. 470.

⁷ Hob. 133.

⁸ Stewart v. Doughty, 9 John. 112.

⁹ Haslett v. Glen, 7 Har. & J. 17.

¹⁰ Gee v. Young, 1 Hay. 17.

¹¹ Cro. Eliz. 61.

she may devise the growing corn; and if she does not, it passes to her executors.¹ In New Jersey, South Carolina, North Carolina, Rhode Island, Virginia, Kentucky, it is provided, that widows may bequeath their crops.²

50. *Tenant for years* is not, in general, entitled to emblements; because, knowing the determination of his estate, it is his own folly to sow, where he knows he cannot reap. This being the reason of the rule, it is not applicable where such estate is terminated by an event previously uncertain. Thus, if the tenant for years holds under a tenant for life, and the estate terminates by the death of the latter, the former shall have emblements. So also, where one holds for so many years, if A live so long, and A dies before the end of the time; the former has emblements.³ But where a woman, tenant during widowhood, leases for years, and marries, the lessee for years has no emblements.⁴

51. Where the tenant terminates the estate by his own act—as by forfeiture—he has no emblements. So, where he surrenders his lease.⁵

52. A lessor agreed to renew the lease, “if he did not want the farm for his own use.” Before its expiration, the tenant surrendered, having previously sold the growing crop to a stranger. Held, the landlord was entitled to the crop.⁶

53. In Pennsylvania, a tenant for years is by custom entitled to emblements, under the name of a *way-going crop*. But the custom is limited to leases from spring to spring, where there is no crop in the ground at the commencement of the lease. And where A leased to B, for five years, three months’ notice to be given in case of a sale during the term, and no rent to be paid for the year, and there was a winter crop in the ground at the time of leasing, and the tenant, after a sale by the lessor, left in the fall; held, he was entitled to emblements at common law, notwithstanding a knowledge or even direct notice of the sale three months before leaving, the custom of a *way-going crop* not being applicable to this case.⁷

54. If a lessor for years covenant and grant to the lessee to carry away the corn which shall be growing at the end of the term; this is not a mere covenant, nor is it void as a grant *in futuro* of a thing not in esse; but passes the property when it comes into being.⁸

55. The question of emblements, though usually arising between landlord and tenant, may also grow out of other relations known to the law. Thus, where one is forcibly dispossessed of land; after

¹ 1 Cruise. 130.

² Anth. Shep. 255, 564. 1 N. C. Rev. St. 615. 1 Vir. Rev. C. 171. 1 Ky. Rev. L. 575.

³ Co. Lit. 55 b, Whitmarsh v. Cutting, 10 John. 361.

⁴ Oland’s Case, 5 Rep. 116. ⁵ Co. Lit. 55 b. ⁶ Bain v. Clark, 10 John. 424.

⁷ Stultz v. Dickey, 5 Bin. 289. 2 Ser. & R. 14. Comfort v. Duncan, Miles, 229.

⁸ Grantham v. Hawley, Wms. Hobart, 286.

recovering it by a judgment, he is entitled to the crops raised by the trespasser or disseisor, though gathered, if still remaining on the premises.¹

56. If one in possession of land under a judgment recovered upon a writ of entry, being sued in a writ of right, pending this suit sow the land, and the demandant recover judgment and obtain seisin and possession before the crops are gathered; the demandant is entitled to the crops.²

57. The right to emblements is not a mere personal privilege, incapable of transfer; but in this respect, a crop, even while growing and unripe, seems to stand on the same footing with any other property.

58. Thus a growing crop may, it seems, be sold by a tenant before the termination of his estate, and the vendee will have the right to enter and gather it after such termination.

59. So an execution against the tenant may be levied upon the growing crop. And it was held in New York, that the officer might levy the execution in December, making a declaration to that effect, and delay to sell it till the ensuing August, when it became ripe; although it might legally be sold at the former period. He took all the *possession* that was practicable in the case.³

60. The right to emblements involves the right of removing them from the land; and therefore the tenant is allowed a reasonable time for this purpose, during which the reversioner or remainder-man cannot lawfully enter and occupy.⁴

61. In several of the States, the subject of emblements is to some extent regulated by the statute law.

62. In Maryland, "the crop on the land of the deceased, by him or her begun," is made assets in the hands of the executor, &c. So in South Carolina and Virginia. So in Illinois, the executor is empowered to sell the growing crop.⁵

63. The same provision is made in New York, with regard to growing crops, and all produce raised annually by labor and cultivation, except growing grass and fruit not gathered.⁶

64. In Virginia, South Carolina and Kentucky, as an incident to the right of emblements, the slaves of a person deceased, though held by him only for life, shall be continued on the land from March 1 to December 1; and, in Virginia and Kentucky, as a compensation for their services, the executor or administrator shall deliver to the reversioner or remainder-man three barrels of Indian corn for every slave. In all the three States above-named, a crop does not pass as emblements, if the tenant die between December 1 and the first of March

¹ *Thomes v. Moody*, 2 Fairf. 139.

² *Whipple v. Foot*, 2 John. 418.

³ *Anth. Shep.* 428, 489, 575. *Illin. Rev. L.* 642.

⁴ 2 N. Y. Rev. St. 83.

⁵ *King v. Fowler*, 14 Pick. 238.

⁶ *Bevans v. Briscoe*, 4 Harr. & J. 139.

following, or if not gathered before the former period. In Ohio, there are no emblements, unless he die between March 1 and December 1, following.¹ *

65. Sometimes, where substances in their nature movable are thrown upon a man's land, they become his property, as part of the land.

66. Thus sea-weed thrown upon the sea-shore belongs to the owner of the shore; upon the grounds that it increases, not suddenly but gradually, is useful as manure and a protection to the bank; and is also some compensation for the encroachments of the sea upon the land.²

67. The same is true with regard to wreck, as against all the world but the former owner.³ So, where wood and timber floats in the water covering a man's land, he has the exclusive right to seize it and retain it till claimed by the owner in reasonable time.⁴

68. It seems, *dung in a heap* is personal property; but when spread becomes part of the land, because it cannot well be gathered without gathering part of the soil with it.⁵

69. In this connection may properly be considered the subject of *fixtures*—one of sufficient extent and importance to be discussed, as it has been with much ability, in a distinct elementary treatise,[†] and upon which very numerous decisions and nice distinctions are to be found in the books.

70. The law of fixtures relates to those cases where a thing affixed to land, and, until removed, constituting a part of the freehold, is taken away by some party not the owner of the land, as a chattel belonging to him. This class of cases, though analogous to those already considered, in which one man erects buildings upon the land of another by special permission or contract, differ from the latter in two important particulars. In the first place, in the case of fixtures, there is ordinarily *no express permission* or contract for their erection;⁶ and, in the second place, until removed, they are a *part of the freehold*; while in the other case, the thing attached to the land is from its first creation a mere *chattel*, and no part of the freehold. The latter part of this distinction seems to be opposed by some dicta,⁷ which speak of fixtures as *chattels*, and as being "deemed personalty for many other purposes." Thus, as will be seen, they are liable to be taken on execution as personal property. Amos⁸ however is of opinion, that by

¹ Anth. Shep. 489, 575, 653-4. Walk. Intro. 277.

² Emans v. Turnbull, 2 John. 313.

³ Barker v. Bates, 13 Pick. 255.

⁴ Yearworth v. Pierce, Alleyn, 31.

⁵ 2 Browne, 285. 2 Pet. 144.

⁶ Rogers v. Judel, 5 Verm. 223.

⁷ 1 Whart. 95.

⁸ Amos, 9, 10, 814.

* This must be the meaning of the language: "if the tenant die between the first of March and the last of December, they go to the personal representatives; otherwise to the real."

† See Amos & Ferard, on the Law of Fixtures.

annexation they become a part of the freehold, and reassume their character of chattels only upon removal. This seems to be clearly laid down in *Lee v. Risdon*.¹ It is there remarked, that the stealing of such articles would not be felony. So, as will be seen hereafter, a mortgagor may remain in possession of them without rendering the transfer fraudulent; and *replevin* will not lie for them when separated from the land.*

71. It is said that, to constitute a fixture, that is, to give a chattel any thing of the character of real estate, so as to justify a question in regard to it, there must be a *complete annexation to the soil*.² Thus, a building upon blocks, rollers, stilts or pillars; or a varnish-house upon a wooden plate resting on brick work, the quarters being morticed into the plate; or a post wind-mill, laid on cross traces not attached to the ground,—is not a fixture, but a mere chattel.

72. Whether an article is a fixture, is partly a question of fact and partly of law. Every case must depend mainly on its own circumstances.³

73. Several general considerations are of importance in settling whether a thing annexed to the freehold can lawfully be removed. These are, the *nature of the thing*, whether in itself a personal chattel or not; usage; the comparative value of the land before and after the removal; the injury which would be caused by a removal, in regard to which it is said, "the principal thing shall not be destroyed by taking away the accessory;" the situation and business of the tenant; but chiefly the purpose and object of the erection, whether for trade, agriculture, ornament or general improvement of the estate.⁴

74. It is the general rule of the common law, that whatever is once annexed to the freehold becomes a part of it, and therefore cannot be removed by the party making the annexation, who is not the owner of the land.⁵ It will be seen that the former part of this proposition is chiefly important as involving the consequence stated in the latter part. For if the owner of the land himself makes annexations to it, so long as he continues to be the owner, he has the absolute control both of the land and of what is affixed to it. In regard to him, therefore, it is of little *practical* consequence, whether the annexations become a part of the freehold or not. In some of the States, however, the statute law somewhat qualifies the general rule above stated. Thus, in Connecticut,⁶ the machinery in a cotton or woollen factory may be mortgaged either with the building or without, *as if it were real estate*. So, while it may be attached like real estate, it is sold on

¹ 7 Taun. 190.

² Amos, 5, 274, & seq.

³ 1 Brod. & B. 510.

⁴ Amos, 7. *Van Ness v. Pacard*, 2 Pet. 148. *Lawton v. Lawton*, 3 Atk. 15. *Wetherby v. Foster*, 5 Verm. 136.

⁵ 2 Pet. 144. 4 Sim. 338.

⁶ Conn. L. 67-8.

* The tenant has an *interest*, not a mere *power*, as in case of a lease *without impeachment of waste*. (See *Poole's case*, *infra* 13, n. 3.)

execution as personal. But in Rhode Island,¹ the main water wheels, upright and horizontal shafts, drums, pullies and wheels secured to the building and necessary for operating the machinery, and all kettles set, are declared to be real estate, while other parts are personal.

75. By the ancient law, it seems, even a *tenant* had no right to remove things once attached to the freehold—as, for instance, windows, wainscot, benches, &c.² Poole's case³ first definitively settled a different principle, in regard to erections *for trade*, although this exception is said to be almost as old as the rule itself. In a very ancient case it is referred to by the phrase "to occupy his occupation."⁴

76. The general distinction upon the subject is this; that where a thing is accessory to any thing of a personal nature, such as trade, it is a chattel; but where a necessary accessory to the enjoyment of the inheritance, it is a part of the inheritance.⁵

77. In a leading case⁶ upon this subject it is said (though not, as will be presently seen, with perfect accuracy), that questions as to fixtures arise in three cases.⁷ 1. Between heir and executor. That is, when the owner of real estate dies, the question is, whether things attached to the land shall pass with or as a part of it to the heir; or, as personal property, to the executor. In this country, this branch of the subject is comparatively of little consequence, because the personal and real property of one deceased is ordinarily subject to precisely the same appropriation, either for the benefit of creditors or the next of kin.* As between heir and executor, the law is strict in favor of the former, but still allows erections *for trade* to be removed. 2. Between the executor of a tenant for life and the remainder-man or reversioner. Here the law is liberal in allowing the former to remove the tenant's own erections. 3. Between landlord and tenant. And here, in modern times, the tenant is highly favored by the law in regard to the right of removing fixtures; particularly such as pertain to trade and manufactures, which are said to be matters of a *personal nature*, and the former of which has been called in England *the pillar of the state*. The general rule is, that the tenant may remove any thing erected by him, which can be removed without injury to the premises, or putting them in a worse plight than they were in when he entered.⁸

78. As a general summary of the law of fixtures in reference to

¹ R. I. L. 205.

² Co. Lit. 53, a. 1 Whart. 93. Amos. 22.

³ 1 Salk. 368.

⁴ 2 Pet. 144-5. 20 Hen. 7, 13 a & b.

⁵ Hunt v. Mullanphy, 1 Misso. 508. 2 Browne, 285.

⁶ Elwes v. Maw, 3 E. 38.

⁷ 1 Whart. 93.

⁸ 2 Kent, 280. Whiting v. Brastow. 4 Pick. 310. 2 East, 90. 6 John. 5: 2 Browne, 285.

* In Maryland, articles which can be removed without injury to the premises, are made assets in the hands of the executor, &c. Anth. Shep. 428. In New York, things annexed to the freehold or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support. 2 N. Y. Rev. St. 83.

landlord and tenant, it is said¹ that a tenant may remove 1. implements of trade, as, for instance, furnaces, or the vats and coppers of a soap-boiler; or a kettle or boiler in a tannery, put up with brick and mortar; or stills set up in furnaces for making whiskey. 2. Machinery, as a steam engine. 3. Buildings for trade. In regard to the last, if permanently built, the right of removal seems questionable in England, but is well established in this country. The question is not as to the size or form or mode of erection of a building; but whether it is for trade. And it matters not though the trade be of an agricultural nature.² Thus a tenant may remove a wooden dwelling-house, with a cellar of stone or brick and a brick chimney, erected by him for the business of a dairy-man and the residence of those engaged in it, and in part improved for carrying on his trade of a carpenter.³ An erection may be in part only for purposes of trade; as in the case of a cider-mill; or where a grazier also follows the occupation of a butcher; or a farmer uses his grain for distilling; or of machinery for working mines; in all of which, the erections, though connected with trade, are used as means or instruments of obtaining the profits of the land. So in the case of the dairy-man's house, used partly for trade and partly as a habitation. In such instances it is suggested that the right of removal will depend upon the question, what is the *primary* business carried on. 4. The tenant may remove articles erected for ornament or domestic use—unless the removal will cause great injury; such as hangings, glasses, chimney-pieces, blinds, stoves, coffee-mills, shelves, bells, book-cases, cornices, &c.⁴

79. Upon this point a distinction has been recently made between *fixtures* and *fixed furniture*.⁵

80. Upon the principle of the fourth class of cases, it seems, gardeners, nursery-men, &c., occupying as lessees, may remove trees and shrubs which they themselves have planted for the purpose of *sale*; but not where they are planted for any other purpose. Whether green-houses, erected by such occupants, are removable, *quæ*.

81. On the other hand, a tenant in husbandry cannot remove his own erections for merely agricultural purposes, even though he leave the premises precisely as he found them; as, for instance, a beast-house, carpenter's shop or cart-house.⁶

82. Neither can a tenant plough up strawberry-beds in full bearing, though he purchased them of a prior tenant conformably to a general usage.* Nor can he remove a border of box—the tenant not being a gardener.⁷

¹ Amos 274 & seq. Hunt v. Mullanphy, 1 Misso. 508. Burk v. Baxter, 3 ib. 207.

² 1 Whart. 94.

³ Van Ness v. Pacard, 2 Pet. 137.

⁴ Amos, 61-5. Avery v. Chesslyn, 5 Nev. & Man. 372. 2 Pet. 137.

⁵ Birch v. Dawson, 2 Adol. & El. 37. (See also ib. 167.)

⁶ Pantou v. Robert, 2 E. 91. Lee v. Risdon, 7 Taun. 191. Amos, 66.

⁷ Watherell v. Howells, 1 Camp. 227. Empson v. Soden, 4 Barn & Ad. 655.

* This case, however, was decided on the ground that the circumstances showed *malice*. It was said that to take up strawberry-beds would not *per se* be actionable.

83. It has been questioned, however, whether the strict rules of the common law as to agricultural erections are to be considered as adopted in this country, where so large a portion of leased property consists in wild lands, which it is for the interest of landlords to have cleared and built upon.¹

84. Where a tenant has the right of removing, he must in general exercise it before quitting possession; though not necessarily before the end of the term. But if the estate is uncertain in duration—as, for instance, an estate at will or *pour autre vie*—he shall have a reasonable time after its expiration. It has been held that for entering after the term expires, a tenant is liable only for a trespass upon the land; not to the articles removed.² Amos³ questions this principle, and limits the right of removing fixtures after the term expires, to the case where the tenant holds over. This he supposes to be the point settled in *Penton v. Robart*.⁴ Where the tenant quits possession without removing a fixture, he is understood to make a dereliction of it to the landlord. The doctrine contended for by Amos seems to be confirmed by a late decision in England.⁵ And in Pennsylvania, it has been recently settled, that as between a tenant for life and remainder-man, the removal must take place during the estate of the former.

85. A, tenant for life leased for years to B, under an agreement that if the latter made certain erections, he should have the right to remove them, or they should be taken by A, at a valuation. B erected a frame stable and shops. A died before expiration of the lease, but B continued to occupy under and pay rent to the remainder-man, C. C afterwards sold the premises. In an action for rent by C against B, B defended on the ground that he had not been allowed for his erections, and that C had received the value of them in the sale. Held B's right of removing ceased on A's death, and C was not bound by the contract between A and B.⁶

86. In addition to the three classes of cases, enumerated by Lord Ellenborough in *Elwes v. Maw*, in which the question of fixtures arises; there are others, perhaps of less importance, but often occurring in practice and referred to in the books.

87. Thus, while a tenant himself has the right of removing certain things affixed to the realty, his creditors may attempt to seize them as chattels on legal process.⁷ And there seems no room to doubt that whatever the tenant himself might remove may also be thus taken by creditors. Indeed the question of a tenant's own rights is often raised in this way; and therefore the case of a creditor's claim upon

¹ 2 Pet. 145.

² 86 & seq.

³ *Hubbard v. Bagshaw*, 4 Sim. 338.

⁴ *White v. Arndt*, 1 Whart. 91.

⁵ *Holmes v. Tremper*, 20 John. 29.

⁶ 2 E. 88.

⁷ 5 Verm. 136.

fixtures may perhaps with sufficient accuracy be classed under the third of Lord Ellenborough's divisions.

88. Analogous to the case of a lessee, is that of one who occupies the land of another person as his *agent*. And the latter seems to stand on a less favorable footing, in regard to fixtures, than the former.

89. Thus, where the agent of a mill-owner, occupying by permission and indulgence of the latter, who was his brother, inserted in the mill his own mill-stones and irons; held, they became the property of the mill-owner, and were not liable to the creditors of the agent, though the mill had been carried away by a flood, and these alone remained on the premises, and were afterwards removed and offered for sale by the agent.¹

90. Another case of very frequent occurrence relating to the law of fixtures, is that of *vendor* and *purchaser*; where the owner of land conveys it to another, and the question arises what shall pass with and as a part of the land. And here the law is no less strict in favor of the purchaser, than it is in favor of the heir, as between him and the executor.* Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, pass with the realty. Thus, the conveyance of a *saw-mill** passes the mill-chain, dogs and bars connected with it; that of a brewery, passes a malt-mill attached to it; that of a cotton-mill passes the waters, flood-gates, &c., and also the machinery, whether affixed or not. So kettles for manufacturing ashes, though not set, have been held to pass with the premises in which they were used. And there are many articles, absolutely necessary to the use and enjoyment of the land, which will pass to a purchaser whether actually upon the land or not. Such are doors, windows, locks, keys, mill-stones, &c. They are *constructively annexed*.*

91. Nor is it material whether the erection is for trade or manufactures, or merely *agricultural*. If the article in question is necessary for carrying on the business meant to be followed, it passes to the purchaser. Thus, a cotton-gin, attached to the gears in the gin-house upon a cotton plantation, passes with the land.⁴

92. But where the owner of land having a tanning-mill upon it,

¹ Goddard v. Bolster, 6 Greenl. 427.

² Miller v. Plumb, 6 Cow. 665. Holmes v. Tremper, 20 John. 30.

³ Liford's case, 11 Co. 51. Le Roy v. Platt, 4 Paige, 77. Farrar v. Stackpole, 6 Greenl. 154†. Phillipson v. Mullanphy, 1 Missou. 620.

⁴ Farris v. Walker, 1 Bai. 540.

* It is to be observed, however, that this construction depended in part upon the use of the word *mill*, as a term of description.

† This case contains an interesting exposition of the law of fixtures, as modified by the numerous inventions and improvements of modern times, both for purposes of domestic convenience, and more particularly for carrying on the various branches of manufactures.

sold the land, with a parol reservation of the mill, and afterwards sold the latter to another purchaser; held, (it seems) that a mill-stone affixed to the mill with iron fastenings did not pass with the land.¹

93. Where the land conveyed is *public property*, the grant will not pass wood which has been previously cut and corded by a person without title; but the latter may have an action against the purchaser for taking it away.²

94. It has been formerly questioned, whether fixtures would pass by a *mortgage* of the land, without being specially named.³ But there seems to be now no reason to doubt that they do pass.⁴ And the mortgagor's possession is not deemed fraudulent, as in case of mere chattels. So, although an erection, which the jury find to be not a fixture, is separately conveyed in a mortgage of the land, the mortgagee need not take possession of it as a chattel, to give him a title against creditors of the mortgagor.⁵

95. The tenant of a house in which certain fixtures had been erected mortgaged it, without mentioning them. He afterwards assigned the premises and all his estate and effects to trustees, and while the trustees were in treaty for selling the fixtures, the mortgagee, his debt being due, entered forcibly, and refused on demand to deliver them. Held, trover did not lie against him.⁶

96. Of somewhat similar nature is the case of a *mechanic*, claiming a lien upon a building which he has erected. Where such building was a *theatre*, held, the lien embraced the permanent stage, but not the movable scenery and flying stages;⁷ the former being a part of the freehold, but the latter only necessary for theatrical exhibitions—a species of *trade*.

97. As between mortgagor and mortgagee, a different question arises in regard to fixtures, viz. whether either of them may remove erections which he himself has made upon the land. In Massachusetts, one holding land subject to redemption may, even after a decree to redeem, remove a barn and blacksmith's shop erected by him, and so slightly affixed that they may be removed with but little disturbance of the soil.⁸ But in New Hampshire, a mortgagor in possession is a trespasser, if he remove a *mill* which he himself has built, or any thing attached to it. This decision proceeds upon the ground, that the mortgagor has only to redeem in order to have the benefit of the building; and, if not worth redeeming, he ought not to do any thing to lessen the value of the property.^{9*}

¹ Heermance v. Vernoy, 6 John. 5. (See 9 Cow. 39.)

² Jones v. Snelson, 3 Misso. 393.

³ 1 Atk. 477. †

⁴ Amos, 188 & seq. 15 Mass. 159.

⁵ Steward v. Lombe, 1 Brod. & B. 510.

⁶ Longstaff v. Meagre, 2 Adol. & El. 167.

⁷ Olympic, &c. 2 Browne, 285.

⁸ Taylor v. Townsend, 8 Mass. 411.

⁹ Pettengill v. Evans. 5 N. H. 54.

* In New Hampshire the rights of mortgagors seem to be more rigidly restricted than in any other State.

† This case, however, was evidently decided on its own phraseology, and not on any distinction between conditional and absolute sales.

98. Replevin will not lie for fixtures separated and removed from the land.¹

99. In South Carolina a statute provides, that a tenant shall not alter or remove buildings without written permission from the landlord, under penalty of forfeiting the residue of the term.²

100. In England, shares in some corporations have been held to be real estate; as for instance in navigable canals.³

101. So, in Connecticut, shares in a turnpike were held to be real estate. But a subsequent statute has provided otherwise.⁴

102. In Massachusetts, shares in a corporation are personal property, even though the corporation be instituted merely for the purpose of holding real estate.⁵ And it has been very recently decided in Rhode Island, that shares in a bridge corporation were personal property; and also that when they belonged to a wife, and the husband died without doing any act to reduce them to possession, they vested in the wife, not in his administrator.⁶ In North Carolina and Ohio, shares in corporations are personal estate.⁷ And this is undoubtedly the general principle of American law.

103. In Equity, money directed or agreed to be laid out in land is regarded as land.

104. Thus, where one devises and bequeaths all his real and personal estate to trustees to be sold, and then bequeaths the proceeds to an alien; the interest bequeathed to the latter is personal estate, and he shall hold it.⁸

105. A court of Equity, regarding the substance and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance—provided the purposes for which the acts are to be done are legal and can be carried into effect.⁹

106. Where one of several heirs takes a conveyance to himself of land purchased by his ancestor, he holds in trust for himself and his co-heirs.¹⁰

107. Where money is directed or agreed to be turned into land or the converse, if the *cestui que trust* has the whole beneficial interest, he may at any time before the conversion takes place, either by his acts or declarations, or by application to a court, elect to take either the land or the money. If he make no election and die, as to his representatives the conversion shall be intended to have taken place.¹¹

¹ Powell v. Smith, 2 Watts, 126.

² 1 Cruise, 38.

³ Welles v. Cowles, 2 Conn. 567. Dut. Dig. 46.

⁴ Sull. on Land Titles, 71. 4 Dane, 670.

⁵ Arnold v. Ruggles, 8 J. C. Sept. 1837.

⁶ 1 N. C. Rev. St. 121. Walk. Introd. 211.

⁷ Craig v. Leslie, 3 Wheat. 563.

⁸ 3 Wheat. 578. Hawley v. James, 5 Paige, 318.

⁹ Reynolds v. Clark, Wright, 656.

¹⁰ S. C. Stat. March 1817, p. 37.

¹¹ 3 Wheat. 563.

108. Where by will land is appropriated to the payment of debts and legacies, the heir or residuary legatee has a resulting trust in the land, subject to the fulfilment of this object: and he may either restrain the trustee from selling more than is required, or offer to pay the debts and legacies; and either a portion of the land or the whole, as the case may be, will then be held as land, and not as money. Otherwise, where the evident intent is to give the character of personality to the whole proceeds.¹

109. In England it has been held, that the land shall be treated as land with reference to a residuary legatee, even though he have made no election. But this doctrine is expressly overruled in this country.²

110. Where land of one deceased is sold by order of court for payment of debts, the surplus shall be distributed as real estate. So a recognizance given to husband and wife for her share in the estate of one deceased, survives to her upon the husband's death—following the nature of the land. But a bond given to one heir for his share of the land descended, is personal property.^{3*}

111. The distinction between real and personal estate, though less important in the United States than in England, where by the common law lands are not subject even to the payment of debts except of a certain kind, is notwithstanding, in many points of view, of the highest consequence. Real estate in many of the States cannot be held by *aliens*. Real estate only can be entailed or is subject to curtesy and dower. Different formalities are required for the conveyance and devise of real and personal property. Lands and chattels are disposed of differently by executors and administrators and upon legal process. And the distinction often decides the validity of uses, trusts and remainders. The various tenures, incidents, liabilities and transfers of real property are not of course to be properly treated of in this mere introductory view; but will constitute the subjects of the subsequent portions of the present work.

¹ 3 Wheat. 582-3-5.

² *Ib.* Roper v. Radcliffe, 9 Mod. 167.

³ 2 Yeates, 261. 1 Bin. 364. 2 S. & R. 493.

* These several points have been decided in Pennsylvania. They seem hardly reconcilable with each other. The first is conformable to the statute law of Massachusetts. Mass. Rev. St. 457.

CHAPTER II.

ESTATES IN LAND. ESTATE IN FEE SIMPLE.

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| 1. Estates. | 27. Seisin of heirs. |
| 5. Freehold. | 31. Seisin in law and deed. |
| 8. Fee simple. | 33. Disseisin. |
| 9. Feudal law and American Tenures. | 45. Abeyance. |
| 16. Seisin. | 48. Freehold in futuro. |
| 21. Entry. | 50. Rectors and parsons. |
| 26. Continual claim. | 56. Incidents to a fee simple. |

1. An *estate* in land, is the interest which the tenant has therein. The words *estate*, *right*, *title* and *interest*, express substantially the same idea, more especially when used in a *devise*.¹ The land is one thing, says Plowden, and the estate in the land is another thing ; for an estate in the land is *a time in the land*, or *land for a time*.²

2. Estates may be considered with respect to their *quantity* and their *quality*. *Quantity* is the extent of time or degree of interest ; as in fee, for life, &c. *Quality* refers to the nature, incidents and other collateral qualifications of interest, as a condition, joint-tenancy,³ &c.

3. Another classification of estates is, 1. as to the quantity of interest ; 2. as to the time when it takes effect, whether immediate or future ; 3. as to the number and relation of the owners.⁴

4. Any person holding an interest in land for years, for life, or any greater estate of freehold, in reversion or remainder, is an owner.⁵

5. With respect to the quantity of interest, the primary division of estates is into *Freehold* and *less than Freehold*.

6. A freehold was formerly characterized, as an estate which could be created only by *livery of seisin*, or as the possession of the soil by a freeman, a freeman being one who could go where he pleased.⁶ Neither of these definitions is applicable in the United States. All claim to be freemen, and livery of seisin is universally dispensed with, either by usage or by the express language or necessary implication of statutory provisions. A freehold is now well described as any estate of inheritance or for life in real property.⁷ It seems quite

¹ 2 Caines, 351.

² Plow. 555.

³ Co. Lit. 345 a. 1 Cruise, 39. 2 Bl. Com. 103. 1 Pres. on Est. 7.

⁴ Ib.

⁵ 6 Mass. 251.

⁶ Brit. c. 32. Lit. s. 59. 2 Bl. Com. 80. Dalrymple on Feud. Prop. 11.

⁷ 4 Kent, 23-4. See 1 N. Y. Rev. St. 722.

superfluous to add *immobility* as another quality of freeholds. *Immobility* is a property of land itself, but not of an interest in land.

7. Freeholds are divided into *estates of inheritance* and *estates not of inheritance*. These again are subdivided, as will be seen hereafter.*

8. The highest estate in lands known to the American law is a *fee-simple*. A fee-simple is a *pure inheritance* or *absolute ownership*, clear of any qualification or condition; or "a time in the land without end;" and upon the death of the proprietor gives a right of succession to all his heirs. This application of the word *fee* to express the quantity of interest in land, and not the tenure by which it is held, is as old as Littleton and Plowden, and although questioned by some later commentators, has been on the whole successfully vindicated.¹

9. The learned author of "a Digest of the laws of England respecting real property," prefixed to the *second edition* of his valuable book "a preliminary dissertation on Tenures;" rightly treating this portion of his labors as rather an introduction to the work than a component portion of the work itself. In entering upon a view of the *American* law of Real Property, it can serve no practical purpose to go into all the intricacies of the Feudal Law. The early settlers of this country left that law behind them; or if any relic of it survived till the revolution, all was then swept away. The feudal law was a *political system* which never made any part of American institutions. The policy and government of some States approached nearer to it than that of others. New Hampshire, New York, Virginia, the Carolinas* and Georgia, administered by royal commissions; and Pennsylvania, Maryland and Delaware, by proprietary patent—were, it is true, less decidedly *anti-feudal*, than Massachusetts, Rhode Island and Connecticut, with their free and well-defined corporate charters. Still the *feudal system*, with all its cumbrous machinery, such as it was when abolished in England by St. 12 Cha. 2, c. 24, was never transferred to the United States in practice, and in some instances, as in Massachusetts by a colonial act of 1641, was expressly abrogated; and it has been truly said that every real vestige of *tenure* is annihilated.²

10. In England, the king—himself not a tenant, "because he hath no superior but God Almighty"³—is held to be the only original source of title to real estate. *Theoretically*, a similar principle has been adopted in this country; it having been decided that individual property in lands can be deduced only from the crown, the ante-revolutionary, United States or State governments.⁴ By the law of nations, the discovery of a new continent gave to the discovering nation an

¹ 2 Bl. Com. 81. Lit. s. 1 & n. 1. Plow. 555. ² 4 Kent, 24. Jurist, No. 31, p. 97.

³ Co. Lit. 1 b.

⁴ 3 Kent, 307-8.

* In North Carolina, before the revolution, statutes were enacted "by his Excellency the Palatine and the rest of the true and absolute Lords Proprietors of the Province of Carolina, by and with the advice and consent of the rest of the members of the general assembly."

exclusive right to acquire the soil from the native inhabitants; and individual citizens, no less than foreign governments, were precluded from purchasing it except through the intervention of the public authority. Thus, in New York, it was held, that the Court would not notice claims to lands within the State, under grants from the French government in Canada before the treaty between Great Britain and France in 1763; such claims being at most merely equitable, and a foundation for application to the government. It was subsequently decided, that such French grants were mere nullities, affording no legal evidence of title; that any possession under them was wholly unavailing, being not adverse to any private right, but rather a controversy between the two governments, and therefore such possession did not avoid the effect of a grant from the provincial government after the conquest of Canada. It was long a question in the same State, whether the constitutional prohibition of purchases from the Indians was applicable to purchases from individuals, or only those from the nations or governments. It was finally held to extend to the former, being introduced for the benefit and protection of the Indians as well as the good of the State, and therefore entitled to a benign and liberal interpretation.¹

11. In Delaware, a statute declares the title to lands in that State to be founded upon the cession made by the treaty of peace to the citizens of the United States, by virtue of which the soil of the State became the property of its citizens; and proceeds to declare invalid all grants by former proprietaries, but at the same time confirms them "discharged from all rents, fines and services."²

12. But although American titles to real estate are originally derived from the government, yet, after they have been acquired, the tenant in fee is to all intents and purposes *absolute owner*. Principles undoubtedly remain in American law which are of purely feudal origin, and probably would not originally have made a part of any other than the feudal system. In Ohio, and the other Western States formed from the North Western Territory, it is claimed that, in consequence of the wise ordinance of 1787 as the ground-work of their laws, and the absence of any adoption or immemorial usage of English principles, not one doctrine remains in force that can be deduced from *tenure*, but real estate is owned by an absolute and *allodial** title.³ It may well be doubted whether this is a distinguishing peculiarity of the North Western States. In New York,⁴ the legislature have formally abolished feudal tenures, or more properly disclaimed their existence, and declared all lands to be *allodial*. So the statute law of

¹ Jackson v. Ingraham, 4 John. 163. — v. Waters, 12, 365. Goodell v. Jackson, 20, 693.

² Jurist, Jan. 1834, 94.

³ Del. Rev. L. 545.

⁴ 1 Rev. St. 718.

* The term applied in the English law to such estates of the subject as are not holden of any superior. 2 Bl. Com. 39, 47, 81. Co. Lit. 1 b.

Connecticut,¹ after reciting, that whereas by the establishment of the independence of the United States, the citizens of this State became vested with an *allodial* title to their lands, provides that every proprietor of lands in fee simple has an *absolute and direct property and dominion* therein, and that patents or grants from the general assembly of the colony, according to the charter of Cha. II., are effectual in passing an estate to the purchasers and their heirs forever. So in Pennsylvania and Michigan,² lands are declared to be holden by an *allodial* title.* In South Carolina,³ the statute of Cha. II., establishing the tenure of *free and common socage*, was early adopted by statute with the great body of the common law.

13. On the whole it may be safely said, that with regard to the whole United States alike, the feudal system, as a *law of tenures*, is abolished; and the remark of Chancellor Kent⁴ is strictly true, that an estate in free and pure *allodium*, and an estate in fee simple absolute, both mean the most ample and perfect interest which can be owned in land. I need not spend time to show, that there is nothing *feudal* in the principle, by which lands derived by patent from the government may be forfeited for non-payment of taxes;⁵ nor is there much more of the feudal character or of limitation to absolute ownership, in the doctrine of *escheat*, by which, upon failure of heirs, the land of a tenant in fee simple passes to the State or *the people*. With us, escheats take effect, not upon principles of tenure, but by force of our statutes, to avoid the uncertainty and confusion inseparable from the recognition of a title founded in priority of occupancy.⁶† Moreover, inasmuch as lands and goods upon failure of heirs follow the same destination, if escheat is an infallible symptom of *feudality*, we must admit that every merchant holds his stock in trade by a feudal tenure.

14. The absolute ownership of a tenant in fee simple is indeed subject to one other qualification, which may in this connection be briefly noticed. This, however, is not an existing paramount *title* in the government, but a mere *power* to be exercised on the happening of a future contingency. I refer to the power on the part of the government, common to the United States and all other civilized nations, of taking private property for public purposes, subject to the obligation

¹ Rev. L. 348.² 5 Rawle, 112—3. Mich. L. 393.³ 1 Brev. Dig. 136.⁴ 4 Com. 3.⁵ Clay v. White, 1 Mun. 170.⁶ Sarah Desilver, 5 Rawle, 112—3.

* The charter to Wm. Penn was in free and common socage, with power to aliene, &c. reserving services, rents, &c. to him, not to the king. Hence the statute *quia emptores* was never in force in Pennsylvania. *Ingersoll v. Sergeant*, 1 Whart. 348.

† In the foregoing remarks, I would by no means be understood to undervalue the importance of studying the Feudal Law, (so earnestly contended for by the learned author of "a Course of Legal Study"), as *matter of history*, or as furnishing an *explanation* of some principles now in force. Let it be deeply inquired into, like the *History of England* or the *Civil Law*, by the ingenuous and philosophical student. I have merely wished to explain why it is omitted as a constituent portion of *American Law*.

expressly imposed by the constitution of every State, of paying a fair compensation therefor. This right is termed the right of *eminent domain*. It is exercised in a variety of instances, but for the most part in the taking of private lands for highways, turnpikes, canals and railroads. The subject will be treated at some length in a future portion of this work.

15. In view of the foregoing considerations, it may safely be laid down, that one who holds land in fee simple is the absolute owner. The methods of acquiring this title will be treated of hereafter.

16. An owner in fee simple, as well as of every other freehold estate, is said to be *seised*; while the owner of an estate less than freehold, has *possession* merely and not *seisin*.

17. *Seisin* is of two kinds—*seisin in deed*, or as Lord Coke terms it, “a natural *seisin* ;” and *seisin in law*, or “a civil *seisin*.” The former is *actual possession* of a freehold; the latter, a *legal right* to such possession. Formerly, *seisin in deed* could be acquired only by an actual occupation. In case of a purchase or conveyance, the ceremony of *livery of seisin* was required to vest a title; and, in case of descent, the heir was not *seised in deed*, until he had by himself or another actually entered on the land.

18. How far these principles are in force in the United States will be more particularly considered hereafter.* It is sufficient to say here, that for most purposes an heir is considered as actually *seised* without entry, and that a conveyance by deed, executed, acknowledged and recorded, or, in general, by a patent under the seal of the Commonwealth, gives a *seisin in deed* without entry.¹ The recording of a deed is the legal equivalent for *livery of seisin*.² In Ohio, Massachusetts, Connecticut, and it seems Pennsylvania, it is said *seisin* means nothing more than *ownership*, that there is no distinction between *seisin in law* and *seisin in deed*, and in Ohio that entry probably is not necessary to complete the title of an heir.³

19. But where one gave a deed of wild land, having no title, although the deed was acknowledged and recorded, and the grantee entered but exercised no open and exclusive ownership by fencing or otherwise; it was held that these facts did not give an adverse *seisin* against the will of the owner, the registration not being constructive notice to him.⁴

20. In Kentucky, a *patent* of lands by the Commonwealth gives only a right of entry, not actual *seisin*.⁵

21. Entry, to give *seisin*, may be made by the owner or by his agent. The entry must be made, not by consent, invitation or hospi-

¹ *Pidge v. Tyler*, 4 Mass. 546. *Knox v. Jenks*, 7, 494. *Goodwin v. Hubbard*, 15, 214. *Clay v. White*, 1 Mun. 170.

² *Walk. Intro.* 324, 330. 4 Day, 305—6. 4 Mas. 489.

³ *Bates v. Norcross*, 14 Pick. 224.

* See Deed, Descent, Livery of Seisin.

⁴ 4 Mass. 546.

⁵ *Speed v. Buford*, 3 Bibb, 57.

ality of the occupant, but with the intent to gain seisin, and accompanied by some act or declaration showing such intent. If the entry is such as would be a trespass in a mere stranger, it is effectual, otherwise not. If made by an agent, it is the usual and perhaps most prudent course, to give him a power of attorney under seal. But a general agency is sufficient authority; and if the principal bring a suit founded on the entry, this ratification is sufficient, without previous authority.¹

22. And where an agent was empowered by the owners of certain unoccupied land to "look up the land for them," and entered to survey and take possession, without making any declaration of his intent; held, such declaration was unnecessary.²

23. If one disseised, having a right of entry, enter and give a deed on the land, the deed is effectual to pass a title.³

24. Where one enters on land, claiming no title, he gains no seisin but by ousting the occupant, and not beyond his actual possession. But if there is a claim of title, entry on a part may give a seisin of all to which the title extends, although the land be not enclosed, provided there is no adverse possession.⁴ Lord Coke seems to limit the latter principle to the case where an entry is made merely to complete a seisin in law, like that of an heir; and to regard it as inapplicable where the entry is adverse, as by a disseisee or a feoffor for condition broken. But in another place he explains the distinction between a bare title, such as a condition, involving no interest in or right of action for the land, and the claim of a disseisee.⁵

25. The entry of a man upon land must *ensue* (or correspond with) his action for recovery of the same. Hence one entry can never be sufficient upon lands lying in different counties, or wrongfully taken by several disseisors, or let by one disseisor to several tenants *for life*; because in each of these cases there must be several actions. On the other hand, if the lands are in one county, let by one disseisor to several *tenants for years*, or taken by one disseisor at several times; one entry *in the name of the whole* may be sufficient, because one action would lie.⁶ An analogous distinction is established in England as to livery of seisin. But it is said not to apply, where one manor extends into two counties. This however is doubted.⁷

26. Where an heir is deterred by bodily fear from entering upon the lands descended to him, it will be sufficient to go as near as he can and claim them; which act shall be repeated once in a year

¹ *Richards v. Folsom*, 2 Fairf. 70. *Stearns*, 45. Co. Lit. 245 b. *Plow.* 92-3. In England, an authority to deliver seisin must be by deed. Co. Lit. 52 a.

² *Tolman v. Emerson*, 4 Pick. 160.

³ *Oakes v. Marcy*, 10 Pick. 195.

⁴ *Ellicott v. Pearl*, 10 Pet. 414. *Prop'rs. &c. v. Springer*, 4 Mass. 418. *Green v. Litter*, 8 Cranch. 229. *Barr v. Gratz*, 4 Wheat. 213. *Shrieve v. Summers*, 1 Dana, 239. *Farrar v. Eastman*, 1 Fairf. 191.

⁵ Co. Lit. 15 a, 252 b.

⁶ Co. Lit. 252 b.

⁷ Lit. 61. Co. Lit. 50 a, n 2.

(called in the old law a year and a day), and is then called *continual claim*, and has the effect of actual entry.¹

27. If the land is in possession of a tenant for years, at the death of the ancestor, the heir becomes seised in deed without entry or even receipt of rent. So also where the heir is an infant, and the land is in possession of his guardian.²

28. If the land is in possession of a tenant for life, the heir becomes seised of the rent by receipt of an instalment; but whether of the land also has been doubted.³

29. Where, after the ancestor's death, a stranger enters upon the land, such entry is termed an *abatement*, and defeats the seisin in law of the heir. But the latter may regain seisin by entry, unless the abator have died seised, in which case the heir must in general resort to an action to recover possession.⁴

30. In some cases, however, the entry of a party without title does not defeat the seisin of the heir, but on the contrary gives him a seisin in deed. This is where the entry may be supposed to be not adverse but amicable, and made to prevent the entry of strangers. As where a mother, or in England a younger brother enters. And even the death of a party so entering will not prevent an entry by the heir.⁵ *

31. It may not be unimportant to notice the distinction between seisin *in law* and by *operation of law*; and between seisin *in deed*, and by *deed* or by *purchase*. It has been seen that an heir, who claims by operation of law, is seised only *in law*, until actual entry. But there are other cases, hereafter to be more particularly noticed, where a party, coming to an estate by operation of law, is seised in deed without entry or any other formality. Thus a tenant by the curtesy, upon the death of the wife, becomes fully seised by mere operation of law. So in the case of dower, although the widow does not perfect her title until an actual assignment is made, yet, when made, her title relates back to the death of the husband; she holds, not by the assignment, but by law, and merely in continuation of the husband's estate.

32. The reason of these rules is obvious. Although neither husband nor wife acquires a complete title till the death of the party from whom such title is derived; yet both acquire an *initiate* title before that event—the one upon marriage and birth of issue, the other by marriage alone. And the husband by his own possession, and the wife by her husband's possession, may be regarded as actually seised during the marriage.

33. Intimately connected with the subject of seisin is that of *disseisin*; of which it has been remarked⁶ “there is scarcely a subject in the English law so obscure.” This observation of an English writer

¹ 1 Cruise, 42. Stearns, 18.

² Co. Lit. 15 a.

³ Ib.

⁴ 1 Cruise, 42.

⁵ Lit. s. 396, Gilb. Ten. 28. Doe v. Keen, 7 T. R. 386. (See 3 Nev. & M. 331.)

⁶ 1 Cruise, 43.

* Littleton places this rule upon the ground that the younger son claims by the same title with the elder; as heir to his father.

derives confirmation from the various and conflicting decisions upon the subject to be found in the American cases.

34. Disseisin is defined as a wrongful putting out of him that is seized of the freehold.¹ Or it is "where a man entereth into lands or tenements, where his entry is not *congeable* (i. e. by leave or permission) and ousteth him which hath the freehold."²

35. Every entry is not a disseisin, but only such as is under claim and color of title at the commencement. Any other entry is a mere trespass. The intention guides the entry and fixes its character. In other words, adverse possession is one not mixed, but which asserts a right to the exclusion of the plaintiff's. A defective conveyance is admissible evidence to show a possession adverse. An offer to purchase the title, or any act implying a recognition of it, disproves an adverse possession. Possession under an executory contract to purchase cannot be held adverse.³ So if a lessee *pour autre vie* hold over under the false representation that the *cestui que vie* is living; his possession is not adverse.⁴ But where the husband of a woman, tenant for life, held the land for twenty years from her decease; held, he thereby acquired a good adverse title.⁵

36. In Massachusetts,⁶ every person in possession of land, and claiming a freehold, or claiming less than a freehold, if he has turned or kept the owner out of possession, may be treated as a disseisor. Neither force nor fraud is necessary to constitute a disseisin.⁷ But it has been held in New York, that a disseisin which will cast a descent so as to toll an entry, must be a disseisin in fact, expelling the true owner by force or some equivalent act; and in Pennsylvania, that adverse possession is not to be inferred; but possession is presumed to be in subordination to the legal title.⁸

37. It has been held in Massachusetts⁹, that actual knowledge on the part of an owner of land of an adverse occupation, is not necessary to constitute disseisin. It is enough that there are acts in their nature public and notorious, such as fencing or building on the land. So it has been held in the Supreme Court of the United States,¹⁰ that no acts of improvement are necessary to have this effect, where there has been an entry under claim and color of title, followed by a possession for twenty-one years, and where the land is so situated as not to admit of improvements.

38. It is said, that the fencing or enclosing of land has no peculiar

¹ Taylor v. Horde, 1 Burr, 110. 3 Bl. Com. 137.

² Lit. s. 279.

³ Rung v. Shoneberger, 2 Watts, 23. Mitchell v. Lipe, 8 Yerg. 179. Ewing v. Burnet, 11 Pet. 41. Avery v. Baum, Wright, 576. Kinsell v. Daggett, 2 Fairf. 309. Jackson v. Johnson, 5 Cow. 74.

⁴ King v. Axbridge, 4 Nev. & M. 477.

⁵ Doe v. Gregory, 4 Nev. & M. 308.

⁶ Mass. Rev. St. 810, 611.

⁷ Small v. Procter, 15 Mass. 496.

⁸ Smith v. Burtis, 6 John. 197. Rung v. Shoneberger, 2 Watts, 23.

⁹ Poignard v. Smith, 6 Pick. 172. 4 Verm. 155.

¹⁰ Ewing v. Burnet, 11 Pet. 41.

efficacy in regard to seisin. It merely raises a presumption, and other acts, such as raising a crop, making improvements or felling trees, do the same.¹

39. Acts of improvement and ownership, done by a mortgagor, will not operate as a disseisin of the mortgagee.²

40. Mere enjoyment of an easement, being the exercise of a right, cannot make a disseisin of the land.³

41. Where one had driven piles into the ground, which was covered by a mill-pond belonging to another, and had erected and maintained buildings on the piles for sixty years, the water of the pond flowing between the piles; held, a disseisin of the owner of the mill-pond.⁴

42. Where a dock, of which the owner of an adjoining wharf claimed to be seised, was filled up by the town, and in this condition used with the wharf as a highway, and afterwards the whole was paved by the town, though it did not appear that the way had been legally laid out; held, the acts of the town amounted to a disseisin of the dock, but in respect to the wharf were so equivocal, as to present a question for the jury as to the intention to disseise.⁵

43. A stranger without title took possession of land mortgaged, and built on parts of it a blacksmith's shop and carpenter's shop; and the occupants of the former occasionally used parts of the lot adjacent to their shop to spread their boards on, and the occupants of the latter used other parts of the lot to run carriages on, and put tires on wheels. Held, the mortgagee was hereby disseised only of the part of the land covered by the shops.⁶

44. It is intimated, that the law will require peculiarly strict proof to constitute a possession adverse, in a newly settled country. The property acquired by settlers on public lands is novel in its character, peculiar to the western States, not like that of a bailee or trustee, or that of mere wanton trespassers. With the revolution, it became an object to raise a revenue from the sale of vacant lands, without requiring any actual settlement or cultivation. Hence it is a settled rule, that the possession of such lands follows the title, and so continues until an adverse possession is clearly made out.⁷

45. There are some cases, where, for the time, an estate is so situated that no person is seised of it in fee. Thus, if land be conveyed to A for life, remainder to the right heirs of B, who is living; during B's life no one is seised in fee. The fee is said to be in *abeyance*; a word derived from the French *bayer*, to expect, and meaning in remembrance, intendment and consideration of the law.⁸

¹ *Ellicott v. Pearl*, 10 Pet. 414.

² *Hunt v. Hunt*, 14 Pick. 374. *Fenwick v. Macey*, 1 Dana, 279.

³ *Stetson v. Veazie*, 2 Fairf. 408.

⁴ *Boston, &c. v. Bulfinch*, 6 Mass. 229.

⁵ *Tyler v. Hammond*, 11 Pick. 193.

⁶ *Poignard v. Smith*, 8 Pick. 272.

⁷ 4 Verm. 155. 1 Ind. R. 129. *Jones v. Snelson*, 3 Misso. 393. 8 John. 270.

⁸ Co. Lit. 342 b.

46. An abeyance of the fee, however, is against the policy of the law, on account of several inconveniences which attend it. Thus, the occupant of the land may commit waste, and there is no one who can maintain an action of waste against him. So the title, if attacked, cannot be completely defended, unless the tenant can pray in aid a present owner in fee. Nor will a writ of right lie against a mere tenant for life.¹ Abeyance is unpropitious to proper care and vigilance in the preservation of property, and to productive labor and improvement.²

47. Sometimes also, even the freehold is in *abeyance*, not even an estate for life being vested in any person. But the law rarely allows this; partly for the feudal reason, not in force in the United States, that the lord could call only upon the tenant of the freehold for services, and partly that a true owner disseised can maintain an action only against such tenant.³

48. For these reasons, by the common law, a freehold estate cannot be conveyed to commence *in futuro*. But in the States of Connecticut, New York and Ohio, this rule has been abolished or greatly qualified. Upon the same ground, in the case of a remainder above supposed (s. 45) if the conveyance were made to A for years, instead of for life, the remainder would be void.⁴

49. By *act of law*, however, the freehold may be in abeyance. One of the few instances of this is where a parson or minister, seised of parsonage lands *in jure parochiæ*, dies; in which case the freehold is in abeyance till his successor is appointed.⁵

50. Rectors and parsons are deemed so far to have a fee simple, that they transmit the estate to their successors; while, for the benefit of those successors, they are restricted in their use of the land within the powers of tenants for life. In England, however, a parson with the assent of the patron and ordinary may grant a perpetual rent-charge from the land.⁶ In South Carolina a statute provides that a parson may bequeath the crop standing on his glebe land.⁷

51. In Massachusetts, as early as 1654, provision was made by a colonial statute for parsonages. By a provincial statute of 28 Geo. 2, c. 9, a congregational minister might convey, with the assent of the parish, and an episcopal minister with the assent of the vestry. The same statute made protestant ministers sole corporations.⁸

52. While the fee is in abeyance, the parish is entitled to the profits.⁹

53. A conveyance in fee by the parish to the minister is void.

54. A parish for certain considerations released and sold to the

¹ 1 Cruise, 45. ² 3 Fairf. 492. ³ Dyer, 71 a. Hob. 338. 1 Cruise, 43.

⁴ 4 Dane, 646. 1 N. Y. Rev. St. 724. Walk. Intro. 278, 286. ⁵ Lit. a. 647.

⁶ Co. Lit. 341 a & b. Lit. 648.

⁷ Anth. Shep. 564.

⁸ Jurist, July, 1836, p. 268.

⁹ Weston v. Hunt, 2 Mass. 500. Brown v. Porter, 10, 97.

minister parsonage property. The minister by his will authorized his executors to sell the lands, who accordingly sold them. Held, the above-named release did not in any way enlarge the minister's estate, and that it could not be coupled with the will and executors' sale, so as to constitute a joint conveyance by minister and parish.¹

55. So in Maine, where a town with the assent of the minister voted that he should have the use of one half of the parsonage lands; it was held that the fee of the whole lands still remained in him.²

56. To every estate in lands the law has annexed certain peculiar incidents, rights and privileges, which appertain to it as of course, without being expressly enumerated. In some instances these incidents are absolutely inseparable from the estate, while in others they may be restricted or destroyed by express provisions and conditions.³

A fee simple being the absolute ownership, the law regards its incidents as inseparable from the estate, and any restriction upon them as repugnant, and therefore void.* Such are the rights of descent, of curtesy and dower, belonging not to the owner himself but to those claiming under him. These will be considered hereafter. Such also is the right, in the owner himself, of *unlimited alienation*.

57. A condition, in a conveyance or devise in fee-simple, against alienation generally, is void. Hence the usual clause in conveyances of the fee, "assigns forever," has no legal effect.⁴ If used with the word *heirs*, it is superfluous; if without, it confers no new right.

58. So any condition or local custom against *leasing* the land is void. But a condition against alienation to any particular person, or an unlawful alienation, as in *mortmain*,† is valid. So if A convey to B one lot of land, on condition that B shall not alien another lot, of which B was previously seised; this condition is valid. And it has been said that a condition against alienation generally may be annexed to the creation of a new rent-charge. But Lord Coke says "this is against the height and purity of a fee-simple."⁵

¹ Austin v. Thomas, 14 Mass. 333.

² Bucksport v. Spofford, 3 Fairf. 487.

³ 1 Cruise, 46. Lit. 360.

⁴ 2 Prest. Est. 3.

⁵ Co. Lit. 223 a, b. Dyer, 357 b. Lit. 361.

* With regard to the incidents of estates, there seems to be little uniformity or consistency in the law. While in some instances they are made subject to express limitations and agreements, in others they are held to *override* all stipulations against them. There seems to be good reason why the incidents of an estate in fee-simple should be held inseparable from it. But the same principle is adopted in regard to estates-tail. Thus a condition against the right to curtesy or dower in such estates is void. So an estate at will must be at the will of both parties, though expressed otherwise. So if land be given to A and his heirs for twenty-one years, it goes to his executors. But on the other hand, though the right of assigning or underletting is incident to an estate for years, it may be controlled by an express condition or covenant. So a mortgage, though personal estate, will pass as real estate, where such appears to be the intent of a testator.

† A clause was anciently in use allowing alienation to all but religious men and Jews.

CHAPTER III.

QUALIFIED AND CONDITIONAL FEES AND ESTATES TAIL.

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| 1. Fees, qualified, conditional, &c. | 18. Conveyance by tenant in tail. |
| 3. Estates Tail—origin. | 25. Contracts of tenant in tail. |
| 5. Description. | 27. Entailment—how barred. |
| 6. What may be entailed. | 28. Estates tail in the United States. |
| 12. Rights and duties of tenant in tail. | |

1. HAVING treated of estates in fee simple, I proceed to consider other estates of inheritance of an inferior kind. These have been by some writers included in one class, by others divided into fees *qualified* and *conditional*, and by others into *qualified*, *conditional* and *tail*; but such minute distinctions of classification are of little consequence.¹

2. Where an estate limited to a person and his heirs has a qualification annexed to it, by which it must determine whenever that qualification is at an end; it is a *qualified* or *base* fee. In other words, a qualified, base or determinable fee, is an interest which may continue forever, but is liable to be ended by some act or event, circumscribing its continuance or extent. Thus if land is granted to A and his heirs *tenants of the manor of Dale*, whenever the heirs of A cease to be tenants of this manor, their estate terminates.² So a devise to trustees and their heirs, upon trust to pay the testator's debts and legacies, and after payment thereof to his sister for life, &c.; gives a base fee to the trustees, determinable on payment of the debts and legacies.³

3. To this class of fees or inheritances belong *conditional fees* and *estates tail*. A conditional fee is a limitation of an estate to *some particular heirs* of a man, exclusive of others—as, for instance, to the *heirs of his body*, or the *male heirs of his body*. This kind of limitation, originally unknown to the common law, gradually at an early period came into extensive use. It was construed by the judges to differ from a fee simple only in the following points; that its duration beyond the life of the donee depended upon his having issue, and when this condition was fulfilled, it became liable to alienation, forfeiture and incumbrance, like an absolute estate. The owner might also alienate the estate before the birth of issue, and neither the donor, nor the issue,

¹ 2 Bl. Com. 104–9. Co. Litt. 1 b. Plow. 241. 1 Prest. on Est. 420. 4 Kent, 5. Plow. 557.

² 1 Cruise, 51. 4 Kent, 9.

³ Willington v. Willington, 1 Bl. R. 645.

when born, could reclaim it. When the donee died without having had issue, or when his issue died without issue, and not having alienated, the donor might re-enter as for breach of condition.

4. From this form of limitation originated *estates-tail*, so called after an ancient German feud—"feudum talliatum." These were established by the statute Westminster 2, 13 Edw. I., entitled the statute "de donis conditionalibus." This act, in general, forbids persons to whom the above named estates are conveyed, from barring their issue and the donor by alienation. Its passage was procured by the nobility, with the object of perpetuating estates in their families; and it provides, that if the donee die, leaving issue, they shall take the estate; but if he die leaving no issue, or upon any future failure of lineal heirs of the class to which the estate is limited, it shall return back to the donor or his heirs. The effect of this statute is, that whereas the estate was before a conditional fee, and the donor's right of re-entry founded on breach or failure of condition; an *estate tail* is viewed as *carved out of the inheritance*, like any other particular estate, and upon its expiring by limitation, the donor or his heirs re-enter like any other reversioners.

5. An estate-tail is defined¹ as an estate of inheritance, created by the statute "de donis conditionalibus," and descendible to some particular heirs only of the person to whom it is granted.* It is of two kinds—*general* and *special*; the former descendible to the heirs of the body generally; the latter to some particular heirs of the body. In the former case, the issue of the donor, male or female, by any marriage may inherit. A special entailment may be made either to the issue begotten upon a certain wife; or to issue male or issue female;† and no children can inherit who do not fall within these respective descriptions.‡ Thus, in case of an estate in tail male, if the donee has a daughter, she cannot inherit⁴; nor can the son of such daughter inherit, being obliged to claim through her. So if lands be given to a man and the heirs male of his body, remainder to him and the heirs female of his body, and the donee has issue a son, who has issue a daughter, who has issue a son; this son cannot inherit either of the estates; because he cannot deduce his descent wholly either through the male or female line.⁵

6. Not only lands may be entailed, but every species of incorporeal

¹ 1 Cruise 56. 2 Bl. Com. 4 Kent.

² 1 Roll. Abrid. 841 contra; see Co. Litt. 19 a. n. 4.

³ Co. Lit. 25 b.

* Inasmuch as these heirs must be *heirs of the body or lineal descendants*, perhaps the definition in the text might be rendered more strictly accurate, by specifying this necessary element in the estate.

† It has been questioned whether the law would sustain the latter form of limitation. But, it seems, without reason. Co. Lit. 25, a. n. 1.

‡ Before the statute *de donis* (upon what principle it is difficult to understand), although the limitation was made to issue had by a certain wife, yet after the birth of such issue, the land became descendible to *any* issue of the donee whatever. Co. Lit. 19, a. n. 2.

property of a real nature—such as dignities in England, estovers, commons, or other profits concerning, or annexed to, or granted out of land. So charters or muniments of title.¹

7. So, in Equity, money directed or agreed to be laid out in the purchase of land may be entailed.²

8. But inheritances merely personal, not real rights or interests, or partaking of the realty—as, for instance, an annuity charging only the person and not the lands of the grantor, are not entailable, but the subjects of a conditional fee at common law, and absolutely alienable on the birth of issue.³

9. Thus, an annuity in fee simple, granted by the crown out of the four and a half per cent. duties, payable for imports and exports at Barbadoes.⁴

10. So an annuity granted by Parliament out of the revenues of the post office, redeemable upon payment of a sum of money, to be laid out in land, is not entailable, notwithstanding the latter provision; for Chancery will not treat the annuity as land, merely upon a possibility of such future redemption.⁵

11. The instance of an *annuity* seems to be the only one in which even a conditional fee in a personal chattel can be created. In Equity, estates *pour autre vie*, terms and chattels, though they may be limited in strict settlement, cannot be entailed. Terms and chattels pass absolutely by a limitation which would operate as an entailment of real estate.⁶ In New York, the same restriction is imposed upon perpetuities in chattels real, as in freehold estates.⁷

12. Tenant in tail, being owner of the inheritance, may commit waste. But the power must be exercised during his life. Hence, if he sell trees growing on the land, the vendee must cut them during the life of the tenant in tail; otherwise they descend with the land to his heir.⁸

13. The grantee of a tenant in tail, and the grantee of such grantee, may commit waste.⁹

14. Chancery will not interfere to restrain a tenant in tail from committing waste, although he is an infant in feeble health and not likely to live to full age.¹⁰

15. The power of waste is so far an inseparable incident to an estate-tail, that a bond against it is repugnant and void, like a recog-

¹ 1 Cruise, 58-9. Nevil's case, 7 Rep. 33. Co. Lit. 20 a.

² Ibid.

³ Ib. 2 Ves. 178. Co. Litt. 20 a.

⁴ Stafford v. Buckley, 2 Ves. 170.

⁵ Holderness v. Carmarthen, 1 Bro. R. 376.

⁶ 2 Chit. Black. 89, n. 2 Story on Equity, 252-3. Dorr v. Wainwright, 13 Pick. 330. Betty v. Moore, 1 Dana, 236. Harkins v. Coalter, 2 Porter, 463. Co. Litt. 20, a. n. 5. Adams v. Cruft, 14 Pick. 25. Kirch v. Ward, 2 Sim. & Stu. 409.

⁷ 1 N. Y. Rev. St. 724.

⁸ Perk. s. 58. Hales v. Petit, Plow. 259. Liford's case, 11 Rep. 50 a.

⁹ 1 Cruise, 60.

¹⁰ Glenorchy v. Bosville, Cas. Temp. Talbot, 16.

nizance not to suffer a common recovery ; and Chancery will order it to be given up and cancelled.¹

16. Tenant in tail is entitled to all deeds and muniments belonging to the lands ; and Chancery will compel a delivery of them to him.²

17. He is not bound to pay off incumbrances. But if he does, he will be presumed to have done it in exoneration of the estate in fee simple.³

18. The statute "de donis" restrains the tenant in tail from alienating his estate for a longer term than his own life. Where he grants away his whole interest, according to some authorities the grantee's estate is for the life of the tenant in tail, the reversion being in abeyance ; while according to others, it is a *base fee*, descendible to the grantee's heirs so long as the tenant in tail has heirs of his body, and subject to dower.⁴

19. The prohibition against alienation, though not expressly extended to the issue, applies to them also by implication. The *equal mischief* implies the *like law*.⁵

20. Where tenant in tail conveys away his estate, the interest of the grantee does not terminate *ipso facto* with the death of the former, but is merely defeasible or subject to be avoided by the issue ; because he has the inheritance in him, and the statute *de donis* makes no alteration as to him, but merely provides that the issue shall not be disinherited.⁶

21. But where something is *granted out of* an estate tail, as, for instance, a *rent*, it becomes absolutely void at his death.⁷

22. Where tenant in tail mortgages the land, Chancery will decree him to make as perfect a title as he is capable of making, and to pay the amount due in a certain time, or be foreclosed.⁸

23. Where tenant in tail covenants to stand seised to the use of himself for life, remainder to another in fee ; the whole limitation is void, and his former estate continues.⁹

24. But an estate created by him, which must or may commence in his life-time, is good. Thus a remainder after a life estate will be valid, till avoided by the issue.¹⁰

25. Although a different rule prevailed formerly, it is now settled that the issue in tail is not bound by any contracts of his ancestor in relation to the estate, either in law or Equity. Nor will Equity aid in carrying into effect an incomplete alienation against him, as, for instance, a *fine*.¹¹

¹ *Jervis v. Bruton*, 2 Vern. 251.

² 1 Cruise, 61.

³ *Jones v. Morgan*, 1 Bro. R. 206. 11 Ves. 277. *Shrewsbury v. Shrewsbury*, 1 Ves. jr. 227. 15 Ves. 173.

⁴ Lit. s. 650. Plow. 554-7. *Seymour's case*, 10 Rep. 96 a.

⁵ Plow. 13. *T. Jones*, 239.

⁶ *Machell v. Clarke*, 2 Ld. Ray. 779. 4 Conn. 179.

⁷ *Walter v. Bould*, Bulstr. 32.

⁸ *Sutton v. Stone*, 2 Atk. 100.

⁹ *Beddingfield's Case*, Cro. Eliz. 895.

¹⁰ *Machell v. Clark*, 2 Ld. Ray. 782. 7 Mod. 27.

¹¹ *Jenkins v. Keymis*, 1 Lev. 237. *Wharton v. Wharton*, 2 Vern. 3.

26. But if he does any act towards performance, Equity will enforce the contract against him.¹

27. In England, the mischiefs of entailment in rendering real property unalienable became so severe, that constant attempts were made in Parliament to procure a repeal of the statute "*de donis*," but for a long time without success. Judicial construction however at length supplied the place of express legislation. The courts held in the first place, that the issue in tail, having assets, were bound by a warranty of the ancestor; and afterwards, that both the issue and the reversioner or remainder-man might be barred by a feigned recovery. And at length two statutes of Hen. 7 and Hen. 8 declared a *fine* to be a bar of estates tail.²

28. In the United States, estates tail have in a great measure fallen into disuse, and the law pertaining to them is therefore comparatively unimportant.

29. The people of Massachusetts, at a very early period of the country, adopted the idea of entailment, even to the extent of giving an estate limited to one and the heirs of his body, to the oldest son in the first instance, and to the other sons only on failure of his issue. But the use of the common recovery in barring entailments became so universal, that at the time of the revolution there was rarely an estate tail in the province.³

30. In South Carolina, the statute *de donis* never was in force, but the old doctrine prevails of fees conditional at common law.⁴

31. In Virginia, Kentucky, Tennessee, North Carolina, Indiana, Georgia, Mississippi, Alabama, Tennessee and Michigan, entailments are expressly abolished, or estates tail declared to be estates in fee simple. But in Alabama and Mississippi, an estate may be granted to a succession of donees in *esse*, and to the heirs of the body of the remainder-man, and in default of such heirs, to the right heirs of the donor in fee-simple.⁵

32. In Illinois and Missouri the donee in tail takes a life estate, and his issue a fee simple.⁶

33. In New Jersey, Ohio and Connecticut, estates tail become estates in fee simple in the heirs of the original owner. In Connecticut (and probably in the other States), he cannot alienate, and if he leave no issue the lands revert. In Connecticut, the statute which establishes the rule above-named seems to be merely in affirmation of previous decisions. It is there held, that if the tenant convey in fee, the grantee takes a base fee, determinable, on the tenant's death, by entry of the issue.⁷

¹ *Ross v. Ross*, 1 Cha. C. 171. Hob. 203.

² 6 Rep. 40 b. Rolls of Parlia. 2. 142.

³ *Hawley v. Northampton*, 8 Mass. 3. Sull. on Land T. 73-8. ⁴ 4. Grif. 852.

⁵ 1 N. C. Rev. St. 258. Ind. Rev. L. 209. 3 Grif. 441-4, 666, 578, 781. Mich. L. 393.

⁶ Illin. Rev. L. 131. Misso. St. 119.

⁷ Walk. 300. 1 Swift, 79. 3 Day, 332. Kirby, 175. 4 Conn. 179.

34. In Vermont, there has never been any statute or judicial decision on the subject. The constitution provides, that the Legislature shall regulate entails in such manner as to prevent perpetuities.¹

35. In New York, an estate tail may still exist for the benefit of a remainder limited upon its determination.²

36. In Pennsylvania, Maryland, Massachusetts, Maine and Delaware, estates tail may be conveyed, and in Rhode Island and Virginia conveyed or devised, so as to pass a fee simple. In Massachusetts, Maine and Virginia, they are liable for debts, and a sale for creditors passes a fee simple. In Massachusetts, a remainder in tail is not thus liable.³

37. In Pennsylvania, the purchaser of an estate tail on execution may bar the entailment, by suffering a recovery and vouching the tenant.⁴

38. In New Hampshire, Chancellor Kent says, entailments may still be created, though in practice almost unknown. In this State, and also in Pennsylvania and Delaware, they may be barred by a common recovery.⁵ In New Hampshire, by a very recent act, they may also be barred by deed.⁶

39. In Pennsylvania, where the tenant in tail dies, the land descends to his heir at common law.⁷ In Virginia, if escheatable for defect of blood, the estate descends according to the limitation.⁸

CHAPTER IV.

ESTATE FOR LIFE.

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|-------------------------------------|------------------------------|
| 1. Definition. | 13. Title deeds. |
| 2. How created. | 16. Payment of incumbrances. |
| 3. Different forms of life-estates. | 22. Transfer of estate. |
| 6. Merger. | 24. Forfeiture. |
| 8. Estovers. | 40. Estate pour autre vie. |
| 12. Praying in aid. | 56. Presumption of death. |

1. AN estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or

¹ 4 Kent, 16.

² 1 N. Y. Rev. St. 722.

³ Mass. Rev. St. 405-12-16-63. Purd. Dig. 279. 1 Smith's St. 143-4. 1 Vir. Rev. C. 158. 4 Grif. 1057.

⁴ Purd. 280.

⁵ 4 Kent. Purd. Dig. 278. 4 Grif. 1057.

⁶ St 1837, c. 340.

⁷ Purd. Dig. 279. 1 Bin. 96.

⁸ 1 Vir. Rev. C. 159.

persons, or to the happening or not happening of some uncertain event.¹

2. An estate for life may arise either from the act of parties or from operation of law.²

3. A life estate may be created by *act of parties*, either by an express disposition for the life of the grantee or devisee, or of a third person, or both;* or by a general disposition, specifying no limit, which in a deed cannot in general pass an inheritance for want of the word *heirs*.³ So an estate limited upon a contingency, as to a woman during her widowhood, or to a person *quandiu se bene gesserit*, is a life estate, though it may terminate sooner than the owner's life. If given to a woman for her life or widowhood, she holds only during widowhood.⁴ So a conveyance for so long a time as certain salt-works proposed to be erected shall continue to be used, passes a life estate, determinable by the disuse of such works.⁵

4. A lease made by tenant in fee simple *for term of life*, not mentioning whose life, shall be for the life of the lessee, a deed being always construed most strongly against the maker. But a lease in this form by tenant in tail will be for the life of the lessor. So a lease without special limitation by a tenant for life, because this estate he may lawfully make, while a conveyance for the lessee's life would be a wrongful act.⁶

5. A, tenant for life, leases to B, on condition that if B die leaving A, the land shall revert to A. All the estate passes under the condition.⁷

6. One holding an estate for the life of another is called tenant *pour autre vie*. An estate "*pour autre vie*," will *merge* in a remainder for a man's own life—being an inferior interest to the latter, and the lowest species of freehold. But if lands are conveyed to a person for his own life and that of A and B, he has one freehold determinable on his own death and the deaths of A and B, and not two distinct estates, and there is no merger. Lord Coke remarks that the books are very plentiful with cases on this subject, "whereof you may disport yourselves for a time."⁸

7. There are several *incidents* to an estate for life.

8. Tenant for life is entitled to *estovers*, *estoveria rationabilia*, or allowance of necessary wood from the land.⁹

¹ 1 Cruise, 76.

² Ib.

³ Ib. 77. Co. Lit. 42, a.

⁴ 2 Hayw. 234.

⁵ Hurd v. Cushing, 7 Pick. 169.

⁶ Co. Lit. 42, a b. Jackson v. Van Hoesen, 4 Cow. 325.

⁷ Co. Lit. 42, a, n. 11.

⁸ Abbot, &c. v. Bokenham. Dyer, 10 b, 11 Rep. 83. 4 Kent, 26. Co. Lit. 41 b.

⁹ Co. Lit. 41, b.

* An estate may be so situated, that it may last either for the tenant's own life or for that of another person, according to the happening or not happening of some uncertain event. Thus a husband, before the birth of issue, has an interest in the wife's lands for her life; liable, however, to be changed into an interest for his life upon the birth of issue.

9. *Estover* is derived from the French word *estoffe*—material.* The corresponding Saxon word is *botes*.¹

10. There are three kinds of *estovers* or *botes*; house-bote, which is twofold, *estoverium ardendi et edificandi*; *plough-bote*, “*arandi*,” and *hay-bote* “*claudendi*.”²

11. Where a lessor covenants that the tenant for life shall have thorns for hedges by the assignment of the lessor’s bailiff; the tenant may still cut thorns without such assignment, having an implied right to do so. Otherwise, if he had covenanted that he would not cut without assignment. Shelly, J. dissented.³

12. In all real actions, tenant for life may pray in aid, or call for the assistance of, the owner in fee to defend his title, because the former is not generally supposed to have the evidences of title.⁴

13. When and how far a tenant for life is entitled to possession of the title-deeds, seems to be a point somewhat unsettled. In one case, it was said to be a common practice for the Court of Chancery to take them from him and deposit them in Court. And the Court will take care of the deeds, where the tenant manifests an indifference on the subject, and has parted with the possession of them. But on the other hand it has been doubted, whether Chancery will interfere either to take the deeds from the tenant or restore them to him. It will refuse to give them to a remainder-man, where there are intermediate remainders.⁵

14. In an action at law to recover title deeds, the defence was that the defendant held under a *cestui que trust*, claiming by a written declaration of trust. The plaintiff contended that the Court would not notice a merely equitable title. Held, the Court either could or could not notice such title. If the latter, this was because such title was doubtful, and therefore the plaintiff must go into Equity to settle it. If the former, the defendant was entitled to the deeds. In either case, the plaintiff must fail.⁶

15. It will be seen hereafter, that if a widow detains the charters of the estate, she thereby forfeits her dower, and that a jointress will be compelled to deliver up title-deeds, upon having her jointure confirmed.⁷

16. Tenant for life is not bound to pay the principal of any sum charged upon the inheritance. Hence, if he does pay it, he becomes a creditor of the estate, standing in place of the original creditor, and being entitled to the charge for his own benefit, unless he have in

¹ Spel. Glos.

² Co. Lit. 41 b, 13 Rep. 68.

³ Dyer, 19 b. pl. 11 5. Stukeley v. Butler, Hob. 173.

⁴ Booth on R. A. 60.

⁵ Ivie v. Ivie, 1 Atk. 431. Papillon v. Voice, 2 P. Wms. 477. Hicks v. Hicks, Dick. 650. Ford v. Feering, 1 Ves. jun. 72.

⁶ Atkinson v. Baker, 4 T. R. 229.

⁷ See Detinue of Charters, Jointure.

⁸ Hence the English word *stuff*.

some way indicated a contrary intent. But the smallest demonstration is sufficient : and he can claim no interest during his life. The old rule required a tenant for life to bear one third of the debt, but this principle has been pronounced absurd, making no allowance for the different ages in different cases, and overruled.¹

17. In case of a jointure, where the jointress and the issue claim under one settlement, they shall contribute proportionably to the discharge of a prior incumbrance.²

18. Tenant for life is bound to keep down the interest, or if a dowress, one third of the interest, upon incumbrances, whether it accrued before or since the commencement of his estate, and though it exhaust the rents and profits. If the incumbrancer neglect to collect the interest from the tenant for life, the reversioner, &c. may file a bill to charge the rents or have the estate sold. But where the latter for a series of years pays the interest, far exceeding the profits, it is *prima facie* evidence that he meant to discharge the estate, especially if settled ultimately on his family.³

19. The rule above stated applies only to mortgages and other charges upon the inheritance. With regard to renewal leases, in England, and, so far as they are known, in the United States, the charges of renewal are shared by the tenant for life in proportion to the benefit which he derives from it under the particular circumstances ; and this is referred to a master to settle.⁴

20. In general, where tenant in tail pays off an incumbrance, it is understood to be done in discharge of the estate, because he has the power of making it his own. But such tenant, restrained as to alienation, though having powers of leasing and jointuring, stands in this respect like a tenant for life.⁵

21. If a mortgagee, after a neglect by the tenant for life to pay the interest, purchase the estate for life, and then after the tenant's death bring a bill to foreclose ; he shall be charged in his account with all arrears accrued before such purchase. He would have been bound in this way had he taken possession as mortgagee.⁶

22. Tenant for life, unless expressly restrained, may transfer the whole or any part of his estate to a third person ; or he may join with the owner in fee in alienating the entire inheritance. In New Jersey, a statute provides that the assent of the next owner to a conveyance by tenant for life shall appear of record.⁷

23. It is one of the incidents of a tenancy for life, that for certain acts done by the tenant the estate may be forfeited. We shall have

¹ Jones v. Morgan, 1 Bro. R. 205. Earl, &c. v. Hobart, 3 Swanst. 199. White v. White, 4 Vez. 33.

² Carpenter v. Carpenter, 1 Vern. 440.

³ Tracy v. Hereford, 2 Bro. R. 128. Penrin v. Hughes, 5 Ves. 99. 4 Kent, 74. 1 Bro. R. 220.

⁴ 4 Kent, 75.

⁵ 5 Vez. 99.

⁶ Shrewsbury v. Same, 1 Ves. jr 297.

⁷ 1 Cruise, 81. 1 N. J. Rev. C. 348.

occasion hereafter to consider this subject in one point of view under the head of *Waste*. There is another ground of forfeiture, which may properly be considered here.

24. At common law, where a tenant for life undertook to convey by feoffment a larger estate than he himself owned, this interference with another's title, operating to divest the remainder or reversion, was punished by forfeiture of the estate for life to the remainder-man or reversioner. This however was not the only ground of forfeiture; for where tenant for life of a *rent* levied a fine of such rent, although nothing more passed thereby than his lawful estate, still a forfeiture was incurred.¹ This principle, being founded in the feudal system, according to which such a conveyance was a renunciation of the connexion between the lord and his vassal, is for the most part obsolete in American law.² It is said by one distinguished commentator, that scarcely a direct decision upon the subject is to be found in our American books; and another is of opinion, that as the form and nature of American conveyances is that of a *grant*, which passes nothing more than the grantor is entitled to, the doctrine of forfeiture is not in force, even independently of statute provisions, in the United States.³ By the common law, a bargain and sale could not work a forfeiture or discontinuance; to the latter of which livery of seisin or something equivalent is essential. But a bargain and sale, covenant to stand seised, or release, with a *general warranty* annexed, may produce a discontinuance, where the warranty descends upon him who hath right to the lands.⁴

25. It was held in Pennsylvania, as early as 1798, that a statute, making the registry of a deed equivalent in effect to livery, did not give to a recorded deed made by a tenant by the curtesy, the operation of livery in forfeiting the estate. The deed was a quitclaim in regard to the covenants; but the words used were, "grant, bargain, sell, aliene, release, enfeoff and confirm."⁵

26. Whether the doctrine of forfeiture is still in force or not, it is inapplicable where there is no change of possession attending the conveyance. Thus, if the tenant convey to A, even with general warranty, immediately take back a conveyance from him by quitclaim deed, and then mortgage to A, remaining all the time in possession; this works no forfeiture.⁶

27. Forfeiture seems to be unknown in Pennsylvania, Virginia, New York, Connecticut and Massachusetts.

¹ Gilb. Ten. 38—9.

² 5 Dane, 5, 11. 4 Kent, 106.

³ M'Kee v. Pfont, 3 Dall. 486.

⁴ Walk. Intro. 277. 4 Kent. 83—4.

⁵ 1 Pick. 327.

⁶ Stevens v. Winship, 1 Pick. 318.

* "The obvious purpose of the provision (substituting a deed for a feoffment) was to dispense with actual investiture, without imparting to its substitute the feudal and almost inconceivable effect of displacing lawful estates, and turning them to a mere right." "The object was, to give without the aid of feudal ceremonies the legal seisin for lawful purposes." 5 Rawle, 113.

28. In Massachusetts and New York, it is expressly abolished by statute.¹

29. In North Carolina, the Revised Statutes provide that a conveyance by a widow shall pass no more than her own lawful estate.²

30. In Kentucky, a deed, though with warranty, passes only the grantor's estate. But if he warrant for his heirs, they are barred to the value of the land which descends to them. But in New Jersey, warranty of tenant by the curtesy shall not bind his heirs, claiming under the mother.³

31. In New Jersey, if a dowress or tenant for life, being sole, discontinue, or aliene, or suffer any recovery by covenin, the alienation shall be void, but the next owner may enter immediately, as if she were dead. If she aliene with her husband, the forfeiture ceases with his life.⁴

32. In Ohio, a neglect or refusal to pay the taxes upon land causes a forfeiture to the reversioner or remainder-man, though the tenant was a mere trustee for minors. The reversioner, &c. may redeem from the purchaser of the land, but the tenant for life cannot.⁵

33. In Kentucky, where the widow has an allowance in slaves in the nature of dower, if she actually or permissively remove a slave from the State, she forfeits her whole dower.⁶

34. The English law of forfeiture being modified or abrogated in this country as above-mentioned, only a few of the most-general principles on the subject will be here stated.

35. If there be tenant for life, remainder for life, and the tenant and remainder-man join in a feoffment, it is a forfeiture of both their estates.

36. If husband and wife, tenants for life, make a feoffment, it is a forfeiture during coverture. So where he is seised in her right, or where he alone conveys. But the forfeiture ceases with his death.

37. By the English law, there are some other acts besides a conveyance, which on the same principle cause the forfeiture of an estate for life. Thus, if tenant for life levies a fine, or suffers a common recovery, he forfeits his estate.

38. So, if being disseised he brings a writ, and therein claims the fee. So if being sued in a writ of right, he joins the *mise* on the mere right, which is the privilege of the owner in fee.

39. So if a stranger brings an action of waste against him, and he pleads in bar "nul waste faite;" this being an admission that the plaintiff is the party entitled to sue. Or if he is defaulted or pleads covinously in a real action against him.⁷

¹ M'Kee v. Pfont, 3 Dal. 486. 1 Swift, 84. 1 N. Y. R. S. 739. Mass. Rev. St. 405. 5 Dane, 511.

² 1 N. C. Rev. St. 615.

³ 1 Ky. St. 110. 1 N. J. Rev. C. 343.

⁴ 1 N. J. Rev. C. 347-8.

⁵ Chase's Stat. 2. 1368-9. M'Millan v. Robbins, 5 Ohio, 30.

⁶ Anth. Shep. 649.

⁷ Co. Lit. 251 b. 1 Cruise, 82-3

40. An estate *pour autre vie*, though falling under the general title of *life estates*, and regarded as real for many purposes, is a freehold interest *sub modo*, partakes of the nature of personal property, and is subject by law to peculiar modes of disposition. This estate has sometimes been called, though improperly, a *descendible freehold*. The heir does not take *by descent*, but, if at all, as *special occupant*. Lord Eldon said he found it very difficult to determine under what phrase to describe this interest.¹

41. At common law, where one was tenant for the life of another, and died living the latter, any person who first entered might hold the land, by right of occupancy, during the cestui's life, subject of course to the rent reserved, and other liabilities of the former tenant, but not subject to his debts, for the heir might plead "*riens per descent*," though, if it came to the executor or administrator, it would be assets. So slight acts of occupancy would create this title, that it has been thought necessary to decide, that riding over the ground to hunt or hawk doth not make an occupant.

42. This doctrine led to some singular results, where the tenant for life had leased the land. Thus A, tenant for the life of B, leases to C for £5, and C to D for £3. A dies, leaving D in possession. C shall receive from D the £3, and D from C the £5, because D's term is prevented from merging by the intermediate reversion of C, but D has the freehold in reversion expectant on C's term, and the rent incident to it.²

43. St. 29 Chas. 2. c. 3, s. 12, provided, that such estate might be devised, and if not, that it should be assets by descent in the hands of the heir, if he entered as *special occupant* ;* or, if he did not enter, assets in the hands of the executor or administrator. A subsequent statute (14 Geo. 2. c. 20, s. 9,) provided for the distribution of such estate as personal property, in default of any devise or special occupancy.

44. These statutes have been adopted or substantially re-enacted in Maryland, Virginia, Kentucky, North Carolina and Indiana.³

45. In Massachusetts, such estate descends to the heirs, unless devised.⁴

46. In New York and New Jersey, it is a chattel real after the tenant's death, though freehold before, and in New York, though limited to heirs.⁵

47. In Ohio, there is no statutory provision on the subject; but it is said, the courts would never recognise so absurd a doctrine as to

¹ Doe v. Luxton, 6 T. R. 289. 3 P. Wms. 203. 7 Vez. 437, 441.

² Co. Lit. 41 b. Duke, &c. v. Kinton, 2 Vern. 719. 6 T. R. 291. Co. Lit. 41 b, n. 1.

³ 4 Kent, 27-8. Anth. Shep. 428, 490, 655. 1 N. C. Rev. St. 278. Ind. Rev. St. 274. 1 Ky. Rev. L. 669. 1 Vir. R. C. 167.

⁴ Mass. Rev. St. 413-6.

⁵ 1 N. Y. Rev. St. 722. 4 Kent.

* By a special occupant, is to be understood one who enters by virtue of a limitation in the instrument which created the estate. (But see infra (55) that this is not the sole use of the phrase.)

allow a stranger to take possession ; but this estate would pass either to heirs or executors, probably the latter.¹

48. The English and American statutes seem to contemplate chiefly the case where, in general terms, an estate is limited to one man for the life of another. This estate however is often created with special limitations ; in the construction of which there has been no little contradiction and confusion.

49. If an estate be limited to one and *his heirs* or the *heirs of his body*, for the life of another ; no question can arise, because the heirs will hold as special occupants, according to the terms of the grant.

50. So where A, seised of land to him and *his heirs* for the life of B, devises it generally to C, and C dies living B ; the heir of A takes as special occupant.²

51. But a life-estate is not *entailable*, not being an inheritance, nor subject to dower. Therefore, in case of an attempted entailment, the heirs of the body or a remainder-man will take, only in case the tenant has not disposed of the land. He has power to grant it away absolutely, after fulfilment of condition by the birth of issue. It was formerly held that he could bar only the issue, not a remainder-man ; but the rule seems to be now fully settled as above-stated.

52. It has been intimated, that the tenant may even *devise* such estate, so as to bar the heir. But this is doubted.³

53. It has been held, that where the estate is limited to executors, administrators and assigns, it passes, after payment of debts, with the personal estate, to residuary legatees.⁴

54. But if limited to "*heirs*, executors," &c. and not devised, the heir takes as special occupant in preference to the executor.⁵

55. If a wife is tenant *pour autre vie*, the husband shall hold, after her death, as special occupant.⁶

56. An estate for life terminates of course upon the death of the tenant. But such death may sometimes be presumed from circumstances. The common law fixes no period after which this presumption arises. But by virtue of St. 19 Cha. 2, c. 6, the principle of which, though not the act itself, is generally adopted in this country, a continued absence for seven years raises a presumption of death,

¹ Walk. Intro. 275.

² 1 Cruise, 84. Anth. Shep. 428 (Maryland).

³ Doe v. Robinson, 2 Moody & R. 249.

⁴ Low v. Burrow, 3 P. Wms. 262. Doe v. Luxton, 6 T. R. 292. Blake v. Blake, 3 P. Wms. 10, n. 1. 1 Rep. in Ireland, 294.

⁵ Ripley v. Waterworth, 7 Ves. 425.

⁶ Atkinson v. Baker, 4 T. R. 229.

⁷ 2 Kent, 112.

* This case contains the fullest exposition, to be found in the books, of an estate *pour autre vie* at common law, and as affected by the statutes above-named. It was here contended, under the particular form of limitation, on the one hand that the estate went to the heir, not being validly disposed of by an unattested, will ; and on the other, that the executors took it in trust for the legatees. The court remarked that they should sooner give it to the executor for his own benefit than to the heir.

which authorizes the next succeeding owner to enter upon the estate. But if the tenant for life prove to be still living, he shall recover the land with the intermediate rents and profits. Absence for a less period than seven years does not raise a presumption of death. The absence is an absence from the State or Commonwealth. Thus the rule was applied in a case where a husband emigrated from South Carolina to the western country.¹

57. Where a husband, twelve years before, sailed for South America, and neither he, nor any of the crew, nor the vessel, were ever heard of afterwards, it was held, in analogy to the statutes relating to bigamy and to leases determinable on lives, that the death of the husband *must* be presumed, and the wife treated as a feme sole.²

CHAPTER V.

ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

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|---------------------------------------|-----------------------------|
| 1. Life estates created by law. | 3. When it arises. |
| 2. Estate tail after possibility, &c. | 8. Qualities of the estate. |

1. HAVING treated of estates for life created by *act of party*, we are now to consider those created by *act of law*.

2. Of these the first in the English law is called *estate tail after possibility of issue extinct*. This is of little consequence in the United States, and will be very briefly noticed.

3. Where tenements are given to a man and his wife in special tail, and one of them dies without issue; or where they have issue, who die without issue; the surviving man or woman is tenant in tail after possibility of issue extinct, because he can no longer have issue capable of inheriting the estate.

4. So where tenements are given to a man and to his heirs which he shall beget on the body of his wife; if she die without issue by him, he is tenant in tail after, &c.

5. No one can have the above-described estate except a donee in

¹ Woods v. Woods, 2 Bay, 476. Spurr v. Trimble, 1 Mar. 278. Salle v. Primm, 3 Miss. 529. Newman v. Jenkins, 10 Pick. 515. Miller v. Bestes, 3 S. & R. 490.

² King v. Paddock, 18 John. 141.

special tail; because both a tenant in tail general and the issue of tenant in tail special may always by legal possibility during their life have issue capable of inheriting.¹

6. This estate cannot arise without a moral impossibility, caused by act of God, of having issue. Thus a man and woman will remain tenants in special tail, though they live to be more than a hundred years old. So if a man and woman, tenants in tail special, are divorced *causa præcontractus* or *consanguinitatis*, the separation not being by act of God, they become mere joint tenants for life.²

7. This tenancy may exist in a remainder.³

8. In some particulars, the estate above described resembles an estate tail, in others, an ordinary estate for life. The tenant is a tenant for life, but with many of the privileges of a tenant in tail; or a tenant in tail, with many of the restrictions of a tenant for life. Thus such tenant is punishable for waste, the law not divesting him of a power which he once possessed. But whether he acquires a property in the timber cut by him, seems to be a point somewhat unsettled. But, on the other hand, by a feoffment he forfeits his estate; and if he acquire a fee simple or qualified by descent in the same land, his former interest is merged.

9. If tenant in tail after possibility, &c. grant over his estate, the grantee is a mere tenant for life, with none of the peculiar privileges of the former.⁴

CHAPTER VI.

CURTESY.

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|----------------------------------|--------------------------------------|
| 1. Origin of the name. | 24. Conditional fees, &c. |
| 2. Definition of the estate. | 27. Money to be converted into land. |
| 3. Curtesy in the United States. | 29. Land to be converted into money. |
| 4. Requisites. | 31. Wife must have the inheritance. |
| 5. Marriage. | 37. Wild lands. |
| 6. Seisin. | 38. Entry, not necessary. |
| 14. Birth of issue. | 40. How barred. |
| 22. Aliens. | |

1. THE second estate for life, created by act of law, is a *tenancy by the curtesy*. This name has been variously accounted for, upon

¹ Lit. s. 32, 33, 34.

² 1 Inst. 26 a.

³ Bowles' case, 11 Rep. 81 a.

⁴ 1 Cruise, 103-5, 14. 2 Chit. Black. 98 and n. 6.

the grounds that the estate is peculiar to England, that the tenant was entitled to attend upon the lord's *court*, and that it has no *moral* foundation. In the time of Glanville an estate existed, somewhat resembling curtesy, being the interest of a husband in lands given with the wife in *marriagehood*. The birth of issue gave him a life-estate in the lands. From this interest, curtesy seems to have been derived. By the custom of Normandy, the husband held only during his *widowhood*.¹

2. Where a wife is seised of lands in fee simple or fee tail general, or as heir in tail special, and the husband and wife have issue born alive; after the wife's death the husband shall hold the lands for his life, and this estate is a tenancy by the curtesy.² *

3. Curtesy exists in most of the States as at common law, being generally noticed in the statutes, if at all, merely by a recognition of the common law rule. In a few of the States the estate is abolished or greatly modified. In Georgia, it is provided both that a husband shall be heir to his wife, and also that the real estate of the wife shall, like her personal estate, vest absolutely in the husband upon the marriage. Of course curtesy is unknown. In South Carolina, the husband takes the same interest in the wife's lands upon her death, that she would take in his lands upon his death. In Vermont, the husband has curtesy in a fee simple, but only where the issue have died under age and without children.³

4. Four circumstances are necessary to the existence of this estate; viz. *marriage, seisin of the wife, issue, and death of the wife*. And it is wholly immaterial in what order these events occur, provided they all at some time take place. Thus, if the wife is disseised after marriage but before the birth of issue; or if the lands come to her after the death of the issue, the husband still has curtesy.⁴

5. A *void* marriage gives no right to curtesy. It is otherwise with a marriage merely *voidable*, and not actually avoided during the wife's life—because it cannot be avoided afterwards.⁵ †

6. It is the general rule, that the wife or the husband in her right must have been *seised* of the lands. And of corporeal hereditaments there must be a seisin in deed. Thus if lands descend to a woman, who afterwards marries and has issue, but dies before entry; the husband shall not have curtesy.⁶

7. This rule has been changed in Connecticut and Pennsylvania,

¹ 1 Cruise, 106-7. 2 Black. Com. 100. Glanville Tr. 193. Bracton, lib. 5, c. 30, a, 7. Hale's His. of C. L. 1, 219.

² Lit. s. 35. Mass. Rev. St. 411.

³ Prince's Dig. 225, 251. S. C. Stat. 1791. 1 Vt. L. 142.

⁴ 1 Cruise, 107. Co. Lit. 30 a. Paine's case, 8 Rep. 35 b. Menville's case, 13 Rep. 23. (Jackson v. Johnson, 5 Cow. 74.)

⁵ 1 Cruise, 107.

⁶ Co. Lit. 29 a.

* This estate has been termed "*custodiam hereditatis uxoris*." Co. Lit. 30 a n. 5.

† See *infra* Dower—marriage necessary to.

and a *right to seisin* or *potential seisin* merely is there sufficient to give curtesy.* And the rule is not applicable to wild lands,† of which the mere ownership is in general equivalent to actual possession. Nor to incorporeal hereditaments, where no actual seisin is possible. Thus, where a wife seised of a rent dies before it falls due, the husband shall have curtesy. “*Impotentia excusat legem.*”¹

8. In New York, the husband of a woman, who is either heir or devisee, but has never entered, shall not have curtesy. It is said, that the requisition of actual seisin has been made in those cases only where the wife was either heir or devisee; and not where she claimed under a deed, which by the statute of uses transfers an actual seisin without entry.²

9. If lands are leased for years when they descend upon the wife, the possession of the lessee is equivalent to actual seisin of the husband and wife, and he shall have curtesy, although she die before receiving any rent, and although the rent before her death was greatly in arrear. It might be otherwise, if the rent were paid to any other claimant.³

10. A woman, before marriage, grants a term for seventy-five years to a trustee, in trust for her use during coverture. The husband has curtesy.⁴

11. So, where lands descend to a woman subject to a devise to executors for payment of debts, and until the debts are paid; although the executors enter and the wife dies before the debts are paid, the husband still shall have curtesy.⁵

12. At common law, where lands come to a woman subject to a life estate, she has no seisin, and therefore there shall be no curtesy. Whether there shall be curtesy in the rent reserved, if any, seems doubtful. In Equity, reversions are subject to curtesy.⁶

13. In Pennsylvania, the husband shall not have curtesy, where the wife has a mere naked seisin as trustee of the freehold, though she also holds a beneficial interest in the reversion.⁷

¹ *Bush v. Bradley*, 4 Day, 298. *Jackson v. Sellick*, 8 John. 262. *Davis v. Mason*, 1 Pet. 503. Co. Lit. 28 a.

² *Jackson v. Johnson*, 5 Cow. 74. 1b. 98.

³ *De Gray v. Richardson*, 3 Atk. 469.

⁴ *Lowry v. Steele*, 4 Ohio, 171.

⁵ 1 Cruise, 108, (cites *Guavara's case*, 8 Rep. 96 a.)

⁶ 1 Inst. 29 a. and n. 7. 1 Cruise, 108-9.

⁷ *Chew v. Commrs. &c.* 5 Rawle, 160.

* On the ground (in Connecticut) that in all other respects in that State ownership is held equivalent to actual seisin. Thus lands descend from or may be devised by the owner, though not seised. So he may maintain trespass. (Two justices dissented.)

† Johnson J. remarks: “It would indeed be idle to compel an heir or purchaser to find his way through pathless deserts into lands still overrun by the aborigines, in order to break a twig or turn a sod or read a deed, before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England when the Conqueror introduced this tenure, the necessity of actual seisin would never have found its way across the channel.” 1 Pet. 507.

14. Another requisite to curtesy is the birth of issue ; after which the husband is called tenant by the curtesy *initiate*.

15. The issue must be born *alive*. It was formerly held, that the only admissible proof of this fact was its being heard to cry,* and that this proof must come from men, not from women. But other evidence has been since held sufficient, even as early as the reign of Henry 8 ; "for peradventure it may be born dumb."¹

16. The issue must be born during the mother's life. If she die in childbirth, and the child be taken away by the Cæsarean operation, at the death of the wife the husband has no title, the issue not being born, but the estate descends to the child in the womb, and shall not afterwards be divested from it in favor of the husband. Curtesy ought to *begin* by the birth of the issue, and be consummated by the death of the wife.²

17. The issue must be such as can inherit the estate. Therefore, if lands are given to the wife and the heirs male of her body, and she has issue a daughter only, the husband shall not have curtesy.³

18. But a mere possibility of inheriting is sufficient. Thus, if a woman has issue by a first husband, and afterwards issue by a second husband, and both issue be dead ; inasmuch as the latter issue might by possibility inherit, the second husband is tenant by the curtesy.⁴

19. The last named requisite is of course intimately connected with that of the wife's actual seisin, which has been before considered ; because, unless actually seised, her issue cannot inherit the estate from her.⁵

20. In New Jersey, it seems, the birth of issue is not necessary to curtesy.⁶

21. The last requisite, is the death of the wife, by which the husband's estate becomes consummate.⁷†

22. By the English law, an *alien* cannot be tenant by the curtesy, because this is an estate created by act of law, and the law never casts an estate upon a person, which is liable to be immediately divested. It will be seen hereafter,‡ that in many of the States the

¹ Co. Lit. 30 a. 67 a. 29 b. & n. 5. Brac. 438 a. 8 Rep. 34 b. Dyer 25 b. Beal. Rep. 25. 2 Bl Com. 101.

² Co. Lit. 29 b. 8 Rep. 35 a. Marsellis v. Thalhimer, 2 Paige, 35.

³ Co. Lit. 29 b. 8 Rep. 35 b.

⁴ 8 Rep. 34 b. Pres. on Est. 516.

⁵ 4 Kent, (3d edit.) 28.

⁶ Co. Lit. 40 a. 1 Cruise, 110.

⁷ 1 Cruise, 110.

* This is one of many instances of the extreme jealousy exhibited by the ancient law to guard the rights of the heir. See 8 Rep. 34. Bracton says, though the child were called, baptized and buried as a christian, this would be insufficient to give curtesy. In Scotland, it is said, the old rule still prevails. Dyer, 25 b, n. 2.

† See pp. 48-9.

‡ See Dower—Alien.

common law rule upon this subject has been abolished, and in some of them, where it still for the most part remains unchanged, a special exception has been made in favor of *dower*. The particular case of tenant by the curtesy seems to have been generally if not wholly omitted in the statutory provisions.

23. It has already been stated generally in what lands a husband shall have curtesy. A few particular illustrations will here be added.

24. Both conditional fees and estates-tail are subject to curtesy, even notwithstanding an express proviso or condition to the contrary. And in both cases, though the estate of the wife comes to an end by her own death and that of her issue, the husband shall still have his curtesy as against the reversioner or remainder-man. This rule proceeds upon the grounds, that the incident of curtesy is a privilege impliedly annexed to the creation of the estate, and not derived merely from the interest of the wife, and that by the birth of issue the husband gains an initiate title, which cannot afterwards be divested by act of God.¹

25. Devise to a woman in fee, with a devise over if she die under age, without issue. The woman marries, has issue which dies, and dies herself, under age. This is a contingent limitation, not a conditional limitation, and the husband shall have curtesy.²

26. As a general rule, however, *cessante statu primitivo cessat derivativus*; and the case above mentioned is to be regarded as an *exception* from this principle. With regard to curtesy as well as dower, if the primitive estate terminates by force of a *condition* instead of a *limitation*, the derivative interest is also defeated. The distinction is, that by a condition the old paramount title is re-assumed; while a limitation merely shifts the estate from one person to another.³ In other words, where the fee in its original creation is only to continue to a certain period, the husband or wife shall have curtesy or dower after the expiration of such period; but where the estate is first given in fee or in tail, and by subsequent words made determinable upon a certain event, if that event happen, the curtesy or dower ceases.⁴

27. In Equity, there shall be curtesy in money directed or agreed to be laid out in land.

28. Devise of £300 to the testator's daughter A, to be laid out by the executrix in land, and settled to the use of A and her children. If she died without issue, the lands to be equally divided between her brothers and sisters. The money not having been applied as directed, the plaintiff, being the husband of A, brings a bill in Equity, praying that the land might be purchased and settled on him for life as tenant by the curtesy, or the interest paid to him for life. Held, inasmuch

¹ 1 Cruise, 112, (Paine's case, 8 Rep. 34.) Co. Lit. 30 a.

² Buckworth v. Thurkell, 3 B. & P. 652, n. a.* See Moody v. King, 2 Bing. 447.

³ 4 Kent, 32-3, and n. ⁴ Co. Lit. 241, a. n. 170. 3 B. & P. 654.

* It is said by Lord Alvanley, "this case occasioned some noise in the profession at the time it was decided." 3 B. & P. 653.

as A would have been tenant in tail of the land, the plaintiff, as tenant by the curtesy, should have the interest for life.¹

29. So at law, where the land of one deceased is sold for payment of debts, the husband of a devisee who takes subject to such sale, shall have curtesy in the proceeds.

30. A testator, whose personal estate was insufficient for payment of debts, devises the residue of his estate after such payment to his daughters; if the residue exceed \$1000 in value to each, the overplus to be divided, &c. The estate, consisting of wild land, was sold, and bought by the executor. The sale was declared voidable in the probate court after the death of a married daughter, but her heirs afterwards elected to affirm it. Held, the husband of such daughter, on releasing his title to the land, should have a share of the proceeds, being the interest already accrued, with the present value of what would accrue during his life.²

31. Only *estates of inheritance* are subject to curtesy, which is indeed merely a continuation of the inheritance. It is said to come out of the inheritance and not out of the freehold, and cannot exist, unless at the very moment when the husband takes, the inheritance descends upon the children, if living; nor where the estate is to be determined by express limitation or condition upon the wife's death.³

32. Devise to A and her assigns for life. If she should marry, and die leaving issue male, then to such issue and his heirs male forever. A married, had issue, and died living her husband. Held, as A never had an inheritance, the husband could not have curtesy, and this was manifestly the intent of the testator.⁴

33. If the issue take as purchasers, the husband shall not have curtesy; as where there was a devise to the wife and her heirs, but if she died leaving issue, then to such issue and their heirs.⁵

34. Devise to A and her heirs; if she died before her husband, he to have £20 a year for life; the remainder to go to the children. A dies before her husband. Held, he should not have curtesy.⁶

35. A woman tenant in tail conveys by lease and release to trustees, for the use of herself till marriage, remainder to her intended husband for life, remainder to herself for life, remainder to the issue in tail. Held, the husband could not claim after her death, either under the settlement, because this interfered with the estate of the issue in tail, or as tenant by the curtesy, because upon the marriage he took an estate for the life of the wife, and she had no inheritance in possession.⁷

36. Nor shall there be curtesy, where the issue take as purchasers, though the ultimate remainder or reversion in fee is in the wife. Thus, in *Boothby v. Vernon* (supra s. 32), the wife was heir to the testator, and therefore seized of the reversion in fee.

¹ *Sweetapple v. Bindon*, 2 Vern. 536.

² 2 Atk. 47. 9 Mod. 151.

³ *Barker v. Barker*, 2 Sim. 249.

⁷ *Doe v. Rivers*, 7 T. R. 276.

⁵ *Houghton v. Hapgood*, 13 Pick. 184.

⁴ *Boothby v. Vernon*, 9 Mod. 147.

⁶ *Sumner v. Partridge*, 2 Atk. 47.

37. The question is not known to have been ever directly raised, whether a husband shall have curtesy in *wild lands*. From what has been said, (supra s. 7), as to seisin, there would seem to be no doubt upon the point. In one case in Massachusetts,¹ curtesy was allowed in such lands, though no question was made upon the subject. On principle, the same considerations would seem applicable to curtesy and dower. It will be seen, that a husband, not tenant by the curtesy initiate, has no right to clear wild lands of the wife during her life.*

38. Curtesy being an estate vested immediately by law in the husband upon the wife's death, and he having had an initiate title during her life; no entry is necessary to complete his ownership.

39. It will be seen hereafter, that a woman may be barred of dower by other provisions for her benefit. But it seems no such principle is adopted in regard to curtesy.

40. By marriage articles, a woman granted to her intended husband the interest of her money and the rents of her estate in fee simple for her life, to maintain the house and educate their children, until they are of age or married. Held, the husband should have curtesy, as if no such articles had been made, it being a mere executory contract as to the manner in which the general funds should be applied, of which their estates consisted.²

41. At common law, a husband does not lose his curtesy by leaving his wife and living in adultery with another woman. St. Westm. 2, c. 34, provides a forfeiture only in case of dower.³ Nor does he lose curtesy by a divorce for adultery, which is only a *mensa*, &c. A divorce *a vinculo*, granted upon the ground that the marriage was void, of course destroys the right of curtesy.

42. In some of the United States, the principle above stated has been changed by statute.

43. In Indiana, a husband loses curtesy by leaving his wife and living in adultery. But a reconciliation restores his right to curtesy.⁴

44. In treating of *dower*, and the circumstances which operate as a bar thereof, some remarks will be made upon the distinctions between the English and American law of *divorce*.† These are for the most part equally applicable to curtesy. The general principle of American law seems to be, that where a marriage is dissolved by divorce, all the rights of the respective parties, growing out of such marriage, come to an end; and of course that the husband loses his right to curtesy. Such is the express provision of the statutes in North Carolina and Pennsylvania, and such is stated to be the law in Connecticut.⁵ This principle is undoubtedly applicable in all the States, independently of any statutory provision, in cases where a divorce is decreed

¹ Houghton v. Hapgood, 13 Pick. 154.

² Steadman v. Palling, 3 Atk. 423.

³ Sidney v. Sidney, 3 P. Wms. 276.

⁴ Ind. Rev. L. 211.

⁵ 1 N. C. Rev. St. 241. 1 Purd. 214.

1 Swift, 25. (See 8 Conn. 541; 10 Ib. 226.)

* Infra, ch. 7, s. 2. 1 Greenl. 6.

† See Dower—Divorce

for causes which render the marriage void *ab initio*. But inasmuch as divorces are granted in this country for causes *arising after marriage*, a distinction is made in several of the States, as to the effect upon property, of divorces granted for causes arising after marriage, and those granted for causes arising before marriage, which render the marriage void. In Maine and Rhode Island, if the divorce is granted for consanguinity, affinity, or impotence, and in Rhode Island for idiocy or lunacy, all the wife's real estate is restored to her. So if granted for the husband's adultery, or, if there be no issue, for his cruelty, desertion, or neglect to support her, in Maine; in Rhode Island, for his gross misbehavior. On the other hand, in case of divorce for her cruelty, in Maine, the Court may restore her lands; while upon a divorce for her adultery, or in Rhode Island, her cruelty, desertion, or misbehavior, the husband shall have curtesy, subject, in Rhode Island, to an allowance by the Court to the wife.¹ In New York, Illinois and Michigan, if the divorce is for the husband's adultery, the wife's lands are restored to her; and in New York, Illinois and Massachusetts, if for her adultery, he has curtesy, subject, in Massachusetts, to an allowance to the wife.² In New Hampshire and Vermont, the Court *may* restore the wife's lands upon divorce.³ In Ohio, it is said, the husband loses his curtesy by divorce for his adultery, and also, it seems, for *aggression* on the part of the wife; though in the latter case he may hold the land during her life.⁴ In Indiana and Alabama, the disposal of property is at the discretion of the Court. But neither party shall be obliged to part with real estate.⁵ In Missouri, the guilty party loses all rights acquired under the marriage.⁶

CHAPTER VII.

LIFE ESTATE OF THE HUSBAND IN LANDS OF THE WIFE.

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| <ul style="list-style-type: none"> 1. Description of estate. 2. Description and incidents. 4. Statute law as to conveyances, &c. 6. Liability to creditors. 7. Rents and profits. | <ul style="list-style-type: none"> 8. Contract by husband. 9. Conveyances by husband and wife, and statutory law relating thereto. 26. Separate, trust estate of the wife. |
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1. It has already been remarked, that by marriage, seisin, and the birth of issue, a husband becomes, during the life of the wife, tenant

¹ 1 Smith St. 427-8-9. R. I. L. 369.

² 2 N. Y. Rev. St. 146. Mass. Ib. 483. (See 2 Pick. 316.) Illin. Rev. L. 238. Mich. L. 140.

³ N. H. L. 337. 1 Verm. L. 271.

⁴ Ind. Rev. L. 214. Alab. L. 256.

⁵ Walk. Intr. 230, 328.

⁶ Miss. St. 226.

by the curtesy initiate. Intimately connected with such incipient title, is the estate which a husband has in his wife's lands, independently of the birth of issue. It has been remarked, that the case of a tenant by curtesy may be said to be a continuance of this relation in that appropriate manner.¹

2. Where a wife has an inheritance in lands, the husband has a freehold interest *jure uxoris*, or the husband and wife are seised in her right.* This interest is a life estate, being of indeterminate duration. It is a title to the rents and profits during coverture, which, according to Lord Coke, the husband shall receive as "governor of the family." The estate remains entire to the wife or her heirs upon dissolution of the marriage. Upon the wife's death, the husband becomes a tenant at sufferance. Like other tenants for life, the husband is entitled to emblements. He has no right to commit waste. Although the wife can maintain no action at law against him for waste; yet a Court of Chancery will undoubtedly restrain it by injunction. So also the wife may bring a bill in equity by her next friend, to protect her property or secure a support from it. But if the husband and wife join in a bill to recover her property, he may release the suit. But the wife may institute a new one by her next friend against the husband and the former defendant jointly.³

3. The husband's interest is assignable, and subject to be taken on execution. The land is liable to the wife's debts; the profits to those of the husband. In cases of assignment, if he is tenant by the curtesy, that is, after the birth of issue, he may transfer the estate for his own life; otherwise, only for the joint lives of himself and the wife. It is said that he may even convey the entire inheritance; that is, so as to vest in the purchaser a wrongful fee, liable to be defeated by the entry or action of the wife after his death.²

4. In Kentucky, it is provided that a wife, after the husband's death, may enter and sue for her lands lost by his default. Also, that in case of suit against them, which the husband will not defend, she may make defence at any time before judgment, and that no conveyance or other act of the husband shall affect the title of her or her heirs, or others having title by her death. In Kentucky and Virginia, if her land is lost by a judgment against him by default, she may in a suit against the tenant put him to proof of his title.⁴

¹ 10 Mass. 263.

² *Polyblank v. Hawkins*, Doug. 329. Co. Lit. 351 a. 2 Kent, 110. *Barber v. Root*, 10 Mass. 260. Co. Lit. 351. *Jackson v. Cairns*, 20 John. 301. 2 Kent, 111, *Dewall v. Covenhoven*, 5 Paige, 581.

³ (See 16 Pick. 260.) 2 Kent, 112. 1 Greenl. 10. *M'Claim v. Gregg*, 2 Marsh. 457. 2 Rand, 120. 1 Preston Abet. 334, 435-6.

⁴ 1 Ky. Rev. L. 581-2. 1 Vir. R. C. 171.

* "The husband by marriage acquires no right in the inheritance of the wife; he is only entitled to the possession and the pendency of the profits during coverture." *Per Wilde J.* 2 Pick. 519. But in a very recent case he remarks, that they are seised *in fee in her right*. 16 Pick. 165.

5. In New Jersey, a statute provides for an entry by the wife, her heirs or other owner of the estate, notwithstanding any feoffment, fine, &c. by the husband.¹ In Connecticut, the husband's separate conveyance of the wife's inheritance is *ipso facto* void. In Ohio and South Carolina, it will pass his estate, and in Ohio, may as an agreement bind him to procure her conveyance or make compensation.* Limitation does not run against the wife till his death.²

6. An assignee of the husband's estate by levy of an execution, is liable to an action of trespass by husband and wife for waste. The husband's ability to commit waste without subjecting himself to an action, is a mere *power*, or exemption from suit, resulting from the conjugal relation, not a right, and is not transferable. The effect of a levy on the husband's interest is the same as that of a conveyance by him, which would pass the freehold, leaving the reversion in fee in the wife. The husband's joining in the suit is merely made necessary by the general rule of pleading.³

7. The rents and profits of the wife's lands belong absolutely to the husband, and upon his death do not pass to the wife.

8. But on the other hand, no contract of his binds her if she survive him. Thus a purchaser from him of trees on the land cannot cut them after his death.⁴

9. It will be seen hereafter, that the deed of a married woman is in general void. But it is the settled law in all the States, founded in most of them upon express statutes, that the joint deed of husband and wife will pass the whole estate of both.

10. In some of the States, where such conveyance is authorized by express statutes, it seems that prior to the enactment of such statutes the practice had become a common one. But the Court in South Carolina said they would not sustain a *vulgar error* in direct opposition to the law of the land.⁵ In that State however an act was passed to give effect to prior deeds of this nature.

11. In all the States except those of New England, and in Rhode Island, to render such deed effectual, the wife must undergo an examination, for the purpose of ascertaining whether she acts voluntarily or by undue influence of the husband. It is essential that the examination be made *apart* from the husband, except in Georgia, where this requisition seems to be omitted.⁶

¹ 1 N. J. Rev. C. 263.

² Anth. Shep. 160. 4 Con. S. C. 12. Newcomb v. Smith, Wright R. 208. Reynolds v. Clark, lb. 656. Williams v. Pope, lb. 406.

³ Babb v. Perley, 1 Greenl. 6.

⁴ Clapp v. Stoughton, 10 Pick. 463. Flow. 219.

⁵ 4 Con. S. C. 15.

⁶ 1 Vir. Rev. L. 158. 1 N. C. R. S. 227. Mich. L. 158. Anth. Shep. 55, 234, 281, 339, 539, 548, 593. Prince's Dig. 160. Alab. L. 93. Whiting v. Stevens, 4 Conn. 44. Ind. Rev. L. 271. 1 Ind. R. 379. Illin. Rev. L. 133-4. Misso. St. 122. 1 Ky. Rev. L. 440. Dela. St. 1829, 89. 4 Griff. 756. 660.

* It seems at common law, alienation, by the husband, of the wife's land was a discontinuance. But this rule was changed by St. Hen. 8. c. 28. (See Detheridge v. Woodruff, 3 Mon. 245.)

12. In Virginia, it has been held that the private examination or something equivalent is necessary to pass merely equitable rights.¹

13. In Illinois, if the examining magistrate does not personally know the woman, her identity must be proved by one witness. In the same State, she is capable of conveying, if over eighteen years of age. In Missouri, the identity is to be proved by two witnesses.

14. It has been sometimes held, that the wife's conveyance may be effectual, although some statutory requisitions merely formal are not complied with. Thus in Ohio, where the magistrate's certificate stated only the substance of the transaction, this was held sufficient. And a statute of Pennsylvania declares valid all deeds made prior to September 1, 1836, though the certificate be defective. A similar statute exists in South Carolina.²

15. But substantial deviations from the form prescribed will render the deed invalid. Thus where a statute requires the wife to renounce her right to lands in the manner required in the case of dower, and to renounce all her estate, interest and *inheritance*; a renunciation of *all her interest and estate*, and also *all her right and claim of dower*, will not pass her land.³

16. Upon the same principle, a usage or statute, authorizing a married woman to convey her land, being a departure from the common law, will be limited strictly to an actual transfer of the property. Thus a mere agreement made by her to convey, is void even in Chancery. So, in general, she is not bound by the covenants in the deed. A statute of Delaware provides that the wife shall be bound by no warranty except a special warranty against herself, her heirs and those claiming under her; and a statute of Kentucky, that the wife's deed shall not only pass her estate, but "shall be as effectual for every other purpose, as if she were unmarried."⁴

17. But though an agreement by the wife to convey cannot be enforced, an agreement by the husband, though merely parol, and made directly with the wife, in consideration of her conveying her land, will be enforced even against his heirs.

18. A husband agreed in consideration of such conveyance to purchase and build on other lands and convey them to the wife. He did buy and build upon the land, but died without conveying. The husband was very poor at the time of marriage, but the property agreed to be conveyed to the wife greatly exceeded in value the land which the wife parted with. The agreement was enforced against the heirs.⁵

¹ Countz v. Geiger, 1 Call, 167.

² Walk. Intr. 326. Purd. Dig. 205.

³ Brown v. Sparel, 4 Con. (S. C.) 12.

⁴ Wadleigh v. Glines, 6 N. H. 17. Dela. St. 1829, 89. 15 John. 483. 1 Ky. Rev. L. 440. 7 Mass. 291. Dut. Dig. 15. Illin. Rev. L. 134. Misso. St. 122. Butler v. Buckingham, 5 Day, 492. 7 Conn. 228. Ex parte Thomes, 3 Greenl. 50.

⁵ Gosden v. Tucker, 6 Mun. 1.

19. On the other hand, where it was verbally agreed between husband and wife, that he should purchase land in her name, and build a house upon it, and that he should be reimbursed the expense from the sale of other land belonging to her; and the husband fulfilled his part of the contract, but the wife died before a conveyance of her land; it was decreed in Chancery, that the guardian of her infant heirs should convey with the husband, and the proceeds of sale be applied according to the contract.¹

20. A statute requiring private examination of the wife, does not apply to a conveyance made by an executrix under a devise to sell, nor need the husband join in such deed. Such statute does not apply to a deed of the wife's separate trust property.²

21. Where the husband and wife join in conveying her land, a note for the price given to her alone, survives to her upon the death of the husband.³

22. Husband and wife may join in a mortgage of the wife's land, as well as an absolute deed. But the wife's interest shall be thereby incumbered only to the amount of the mortgage debt. Hence, if the husband's right of redemption be taken by his creditors and sold, the wife may redeem the land by paying this debt only, without the additional sum for which the equity was purchased.⁴

23. Where such mortgage is made for the husband's debt, the wife, though not personally bound, is a mere surety, and the mortgage will be discharged by any such new credit given to the principal as would discharge a common surety.⁵

24. It will be seen,* that where an estate is limited to the *separate use* of a married woman, the husband shall not be entitled to curtesy in such estate. Upon the same principle, an estate thus limited shall be owned, in Equity, by the wife alone to all intents and purposes as if she were a feme sole, subject to her disposition, and entirely free from the control of the husband. No actual conveyance to trustees for her separate use is necessary, but a mere ante-nuptial agreement between husband and wife will have the same effect. Under these circumstances, the wife may convey the estate even to the husband, provided no undue influence be used on his part; and it has been settled in New York, though against the opinion of the Chancellor, that her conveyance will be valid without the assent of the trustees, unless such assent were expressly required in the instrument by which the trust was created.⁶ This subject will be more fully considered hereafter.†

¹ *Livingston v. Livingston*, 2 John. Cha. 537.

² *Tyree v. Williams*, 3 Bibb, 368. *Brundige v. Poor*, 2 Gill & J. 1.

³ *Dean v. Richmond*, 5 Pick. 461.

⁴ *Peabody v. Patten*, 2 Pick. 517.

⁵ *Gahn v. Niemcewicz*, 11 Wend. 312.

⁶ *Jaques v. Trustees, &c.* 17 John. 548. *Bradish v. Gibbs*, 3 John. Cha. 540. (See also 3 Ib. 144.)

* See *Trust*.

† See *Conveyance, Devise, Powers*.

CHAPTER VIII.

DOWER. NATURE AND REQUISITES OF DOWER.

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|--------------------------------------|---|
| 1. Definition of dower. | 26. Marriage and divorce in United States. |
| 2-11. Dower in the United States. | 31. Elopement, &c. |
| 10. Origin and history of dower. | 38. Seisin of husband. |
| 12. Dower favored. | 42. Reversions and Remainders. |
| 17. Requisites of dower. | 50. Dos de dote. |
| 18. Marriage. | 61. Instantaneous seisin. |
| 19. Void and voidable marriage. | 66. Whether husband's seisin may be denied. |
| 22. Marriage—how proved. | 68. Death of the husband. |
| 23. Marriage and divorce in England. | 69. Presumption of death. |

1. THE third estate for life created by act of law, is *dower*. Dower is a technical term, and applicable only to real estate.¹ The common law description of this estate is as follows. Where a man is seised during coverture of an inheritance in lands and tenements, which by possibility any issue of his wife might inherit, such wife shall hold after his death one third part of these lands and tenements for her natural life, as an estate in dower. In pursuing this subject, it will be seen that the foregoing definition is inapplicable in many of the States in this country.*

2. In several of the States, as will appear under the title of *Descent*, the widow in certain cases *inherits* the estate of her husband.

3. In Pennsylvania and Indiana,² if an intestate leave a widow and no lawful issue, the former shall have one half of the real estate, including the mansion house, or, in Pennsylvania, the rents and profits thereof, if a division is improper, for her life in Pennsylvania, but, it seems, absolutely in Indiana, in lieu of dower.

4. In Delaware, if there is no child or lawful issue of a child, the widow takes one half the land for life.³

¹ 7 Greenl. 385.

² Purd. Dig. 402. Anth. Shep. 300-3. Ind. Rev. L. 208.

³ Dela. Stat. 1829, 316.

* The common law description of dower has been recently rendered obsolete even in England. By St. 3 & 4 Wm. 4, c. 105, dower is allowed in equitable inheritances and mere rights of entry without seisin. On the other hand, there is no dower in land conveyed by the husband, or devised, or exempted from dower by will; and it is subject to all incumbrances, debts and partial dispositions made by the husband. A devise of land to the widow is a bar of dower; but not a bequest of personal property, unless so expressed.

5. In South Carolina, Illinois, Missouri,* Georgia,† she has the same right (it seems in fee) for want of lineal descendants, in lieu of dower.¹

6. In South Carolina, if an intestate leave no father, mother, brother or sister of the whole blood or their children, or brother or sister of the half blood or lineal ancestor, the widow shall have two thirds of the real estate, in lieu of dower.²

7. In Georgia, where there are children, the widow may at her election have dower, or an equal share of both real and personal estate (subject to debts).³ †

8. In Missouri, if the husband leave a child or descendant by another marriage, the widow may take in lieu of dower the personal property that came to him by her marriage, subject to debts. If the husband leave no child or descendant, she may take her dower at common law free from debts, or the personal property above named subject to them. But her election must be written, acknowledged and filed within six months from the granting of administration.⁴

9. Where the statute law provides a substitute for the right of dower, it is not to be regarded as creating a new interest, but as declaratory or in affirmance of the common law.⁵

10. It is said that the idea of dower is derived from the Germans, and was familiar to the Saxons when they became established in England. Dower then consisted of one moiety of the husband's property, held for life, and liable to forfeiture upon breach of chastity or a second marriage. Afterwards, by the charter of Hen. 1, the latter condition was dispensed with, except where there was issue. In the reign of Hen. 2, a wife was endowed by her husband *at the time of marriage* of one third of the lands which he then held. By the charters of 1217 and 1224, dower was established as one third part of all lands held by the husband during his life, unless a smaller portion had been assigned *at the church door*.⁶

11. The only kind of dower known in practice in this country is that estate, which, according to the above definition, the law confers upon a wife after her husband's death; or dower at common law. The statute laws of Vermont, New Hampshire, Michigan and Maine, refer to provisions made for the wife before marriage under the name of dower, undoubtedly intending thereby a *jointure*, which will be considered hereafter.⁷

12. While, as has been already remarked, curtesy is an estate of

¹ Anth. Shep. 586. Illin. Rev. L. 625. Misso. St. 228. Anth. Shep. 608.

² Anth. Shep. 587-9.

³ Anth. Shep. 607.

⁴ Misso. St. 228.

⁵ 2 Whart. 192.

⁶ 1 Cruise, 118. But see 2 Bl. Com. 102.

⁷ Mass. Rev. St. 409. Anth. Shep. 21, 100. Mich. L. 30. 1 Smith's St. 158.

* The word used is *descendant*.

† In this State, the same code of laws (Prince, 233), contains this provision, and also another, making the wife sole heir to her husband where he leaves no issue. (Ib 253). It is difficult to see how both rules can be in force.

mere positive institution, dower is held to have a strong moral as well as legal foundation. The wife, by marriage, loses most of her rights of property, and would in general be wholly destitute after the husband's death, were not some provision made for her from his real estate. It is said moreover, that in ancient times the personal estates of the richest were very inconsiderable, and the husband could not give his wife any thing during his life, or after his death, both trusts and devises being then unknown.¹

13. For these reasons, a dowress is in the care of the law and a favorite of the law.² *Magna Charta*³ provides, that a widow shall forthwith and without any difficulty have her marriage and her inheritance; nor shall she give any thing for her dower or her marriage or her inheritance which her husband and she held at the day of his death. At common law, a dowress enjoyed the privilege of exemption from tolls and taxes.⁴ It is said, there be three things favored in law—life, liberty and dower;⁵ that dower is a legal, an equitable and a moral right, favored in a high degree by law, and next to life and liberty held sacred.⁶

14. As a mark of peculiar favor to the tenant in dower, although damages were not generally allowed in real actions, they were given to her. Particular relief was also provided for her *quarantine* (a term hereafter to be explained). By the statute of Merton (20 Hen. 3, c. 1) deforcers of dower were to be *in mercy* or fined at the pleasure of the king. Where to a suit for dower the defendant pleaded a false plea, the widow recovered damages from the husband's death, though she had been always in receipt of one half the profits; and the rules of pleading are construed liberally in her favor.⁷

15. The celebrated *ordinance* for government of the North West Territory, expressly secures the right of dower.

16. It is said, however, that the object of dower is not to enrich the widow to the detriment of creditors and impoverishment of the rest of a man's family; but to give an equal third part in value, for the sustenance of the wife, and the nurture and education of younger children. Nor does the law give her any preference over heirs and devisees.⁸

17. There are three circumstances necessary to give a title to dower, viz. marriage, seisin and death of the husband.

18. The marriage must be had between parties legally capable of

¹ 2 P. Wms. 702. *Curtis v. Curtis*, 2 Bro. Ch. 620–30–34. 2 Bing. 451–2. Co. Lit. 30 b. n. 8.

² 1 Story on Eq. 583.

³ M. C. sec. 8. 6 Conn. 462.

⁴ 2 Bl. Com. 138.

⁵ Co. Lit. 124 b.

⁶ 1 Dal. 417.

⁷ *Curtis v. Curtis*, 2 Bro. Cha. 620. Co. Lit. 32 b. 33 a. 4 Con. S. C. 59.

⁸ 2 Con. S. C. 623. 7 J. J. Mar. 637.

^{*} In Tennessee (St. 1835–6, p. 56), land held in dower is expressly made taxable.

contracting it, and duly celebrated. "Ubi nullum matrimonium, ibi nullum dos."¹

19. A marriage may be either *void* or *voidable*; and the consideration whether it is the one or the other, will materially affect the widow's claim of dower. In general, if the marriage were void, there shall be no dower.

20. But although the marriage were contracted before the age of consent, which at common law is fourteen in men, and twelve in women, and therefore voidable by either party, according to the maxim "consensus, non concubitus facit matrimonium;" yet if at the death of the husband the wife have passed the age of nine years, she shall have her dower. The marriage is accounted "legitimum matrimonium quoad dotem," though for other purposes only "sponsalia de futuro." And if at the time of marriage the wife is under nine years of age, and before she reaches that age the husband parts with the land; she shall still have dower, if she live till nine.²

21. A *voidable* marriage can be avoided only during the life of the parties by *divorce*. Hence if in case of such marriage the husband die before any divorce is obtained, his widow shall have dower.³

22. In England, the fact of marriage is ordinarily tried, not by jury, but by a certificate of the bishop, the sentence of the Ecclesiastical Court being held conclusive upon this question. Under special circumstances, however, this mode of trial is not adopted, and in the United States this fact, like others, is tried by jury.⁴

23. The English law on the subject of marriage and divorce is materially different from that which generally prevails in the United States. In England, there are said to be two classes of disabilities or impediments to marriage—*civil* and *canonical*. Of the former class are prior marriage, want of age, moral ability or will; and probably a neglect of the particular mode of celebration prescribed by law. Of the latter are consanguinity, affinity and corporeal infirmity. Civil disabilities render the contract void *ab initio* without divorce; canonical disabilities render it only voidable by *divorce*.

24. In England, a divorce *a vinculo matrimonii* is granted only for causes which existed at the time of marriage, or *canonical* disabilities. Hence, the marriage being avoided as originally unlawful, dower is as effectually barred, as if the marriage had been absolutely void.

25. *Adultery*, being a cause arising after marriage, is ground for divorce only *a mensa et thoro*. Contrary to some ancient opinions, this has been settled not to be a bar of dower, being merely a separation of the parties, and not a dissolution of the marriage. The same is true of a divorce *a mensa* for any other cause than adultery.⁵

¹ Co. Lit. 33 a. 1 Cruise, 121. ² Dyer, 369 a, 368 b. Co. Lit. 33 a, n. 10.

³ Co. Lit. 33 b. ⁴ Robins v. Crutchley, 2 Wil. 122. ⁵ 2 H. Bl. 156. 4 Dane, 673.

⁶ Rolle Abr. Dower, 13. Co. Lit. 33 b. Lady Stowell's case, God. 145. Dame, &c. v. Weeks, Noy. 108.

26. In the United States, the statute law often provides for a divorce for causes which in England render the marriage *void ab initio*. Thus in Ohio, Indiana, Illinois, Missouri, New Hampshire, New Jersey and Alabama, a prior marriage.¹ Whether such provisions have the effect to convert *void* into *voidable* marriages, so that dower will not be barred without divorce, seems to be a point deserving of attention, though I do not find it any where distinctly noticed. In Pennsylvania,² on the other hand, a marriage within the prohibited degrees, which is a canonical disability, is declared *void to all intents and purposes*. But still it is ground for divorce, and after the death of either party its validity cannot be disputed. In the same State, where there is a divorce and separation, or decree that the marriage is null and void; all the duties, rights and claims accruing to either party in pursuance of the marriage shall cease. In this sweeping clause dower of course is included. In New Jersey, Alabama and Mississippi, a marriage contracted while a former husband or wife is living, is declared to be "invalid from the beginning, and absolutely void," but is still dissolved by divorce. In New York and Massachusetts, a process is provided for declaring void a marriage which was void at its inception, by a decree of nullity, though in the latter State such decree is declared to be unnecessary. In Kentucky, the same process is applied to a marriage within the prohibited degrees.

27. It may be laid down as the general rule of American law, that divorce *a vinculo* is a bar of dower. The grounds of divorce are various in the different States. In Virginia, the cause is in the discretion of the legislature, which alone grants divorces. In South Carolina, divorces are never granted. In Indiana and North Carolina, any *just and reasonable* cause. In Georgia, *legal grounds*, and adultery. In Ohio, Illinois and Missouri, a former marriage, desertion, adultery, impotence, cruelty, drunkenness. In New Hampshire and Tennessee, the four first named causes. In Delaware, Pennsylvania, New Hampshire, Mississippi and Alabama, the five first named causes—impotence being that of the husband at the marriage, in Delaware. In Massachusetts, adultery and impotence. In Kentucky, adultery, desertion, cruelty, or the forming a connection with certain religionists, inconsistent with the marriage rights. In Connecticut, adultery, absence, and *fraudulent contract*, meaning some cause which makes the marriage *void ab initio*. In Ohio and Massachusetts, imprisonment. In Missouri and Kentucky, conviction of crime. In Alabama and Mississippi, consanguinity. In Michigan and New York, (it seems) adultery only. In Tennessee, pregnancy with a child of color at the time of marriage. In the same State, the wife of one adjudged insane becomes a *feme sole*, but cannot marry again.³

¹ Walk. Intr. 229. Ind. Rev. L. 213. Illin. R. L. 232-3. Misso. St. 225. N. H. L. 336. Alab. L. 252. 1 N. J. R. C. 667.

² Pard. Dig. 213.

³ Alab. L. 252. 4 Griff. 671. Walk. Intr. 230, 326. 4 Kent. 53. Mass. Rev.

28. The rule above stated, as to the effect of divorce upon dower, is not universally adopted.

29. In New York, Connecticut, Michigan it seems, and Illinois,¹ dower is not barred by divorce for the fault of the husband; but it is barred, as also in Delaware, by a divorce for her own fault, or in Illinois on the ground that the marriage was originally void. Ordinarily, the distinction made in favor of the wife, where the divorce is granted for the fault of the husband, is, that a provision is made for her distinct from dower, either under that name or in some other mode. But dower, as such, is barred. In Massachusetts,² where a man and woman are divorced for the cause of adultery committed by him, or on account of his being sentenced to confinement to hard labor, the wife has her dower. In Kentucky (by the revised laws) and Alabama,³ neither party can be divested of a title to real estate, but in Kentucky, by a late statute, a divorce for the husband's fault gives the wife the same rights as if he were dead.

30. In Connecticut, a sum in gross paid to the wife upon divorce is called *dower*.

31. Although in England a divorce for adultery does not bar dower, yet by Statute Westminster II., c. 34, if a wife willingly leaves her husband and continues with an adulterer, she shall be barred of her dower, if she be convicted thereupon;* except her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him.⁴ †

32. The same consequence follows, though the wife were originally taken away against her will, if she afterwards willingly remain with the adulterer. So, if she be with him criminally without remaining; or once remains with him, and he then detains her against her will; or if he turns her away. So, if with her husband's consent she goes away with another man, who afterwards has criminal connection with her; or if she refuses to accompany her husband on account of objections from her parents and reports of his marriage to another woman; or to return to him, having been driven away by cruelty. It is sufficient that she is in an open state of adultery, whether she live in the

St. 484. 2 N. Y. Ib. 140. Conn. St. 162. Ind. Rev. L. 213. 1 N. C. Rev. St. 230. 3 Griff. 363, 4. 865. 3 Griff. 446. Walk. Intr. 228. Purd. Dig. 212. 4 Griff. 799. Illin. Rev. L. 233. Misso. St. 226. N. H. L. 336. Del. St. 1832, 148. 1 Ky. Rev. L. 122-4. 2, 1157. Mass. Rev. St. 480. Alab. L. 252-5. Dut. 8. Mich. L. 138. Ten. St. 1835-6, p. 166.

¹ 1 N. Y. Rev. St. 741. Illin. Rev. L. 238. Mich. L. 138. Dela. St. 1832, 149.

² Mass. Rev. St. 483, 617.

³ 1 Ky. Rev. L. 124. Ky. St. 1836-7, 394. Alab. L. 256.

⁴ Co. Litt. 32 b.

* In England, the ecclesiastical court alone has jurisdiction of adultery. Perhaps therefore conviction may be there requisite to bar dower. But in the United States the fact must be tried collaterally, if at all, in the suit for dower.

† All which (says Lord Coke) is comprehended shortly in two hexameters.

Sponte virum mulier fugiens, et adultera facta,
Dote sua caret, nisi sponsi sponte retracta.

same house with, or be formally married to the adulterer or not. But merely *living in adultery* without *elopement*, which means a *freedom from the husband's control*, is no bar of dower. The circumstances of the elopement are immaterial.¹

33. A man by deed granted his wife to another,* with whom she eloped and lived adulterously, and after her first husband's death intermarried. Held, the deed was void as a grant or a license; that no averment was admissible, "*quod non fuit adulterium*," and that the wife was barred of dower, notwithstanding a purgation of adultery in the ecclesiastical court. But where the friends of a husband removed him from his wife, published that he was dead, and persuaded her to marry another, and release all her rights under the first marriage; held, she did not leave her husband *sponte*, and therefore was not barred of her dower.²

34. In Connecticut, a woman has dower if living with her husband at his death, or absent by his consent or default, or inevitable accident. And where the husband was a naturalized foreigner, and his wife had always lived abroad, she was barred of her dower upon the principle above stated.³

35. In England, the reconciliation which will avoid the effect of elopement, must be not by coercion of the church (a proceeding unknown to our laws), but voluntary on the part of the husband. And the better opinion seems to be, that *cohabitation* subsequent to the elopement—as for instance, sleeping together at several times and places, although the parties do not permanently occupy the same house—is sufficient proof of reconciliation.⁴

36. Reconciliation has a retrospective effect upon the rights of the wife. Thus, if the husband purchase and aliene lands during the elopement, she shall still have her dower therein.⁵

37. The old English statute upon this subject has been generally adopted in this country, and in the States of Virginia, North Carolina, New Jersey, Illinois, Missouri, Indiana and Delaware, expressly or substantially re-enacted. But in New York there must be a divorce for misconduct, or a conviction of adultery by the husband, to bar dower.⁶

38. To give a title to dower, the husband must have been *seised* of the lands.

39. But a *seisin* in law is sufficient; upon the ground that the

¹ *Hetherington v. Graham*, 6 Bing. 135. *Stegall v. Stegall*, 2 Brock. 256. *Bell v. Neely*, 1 Bai. 312. *Cogswell v. Tibbetts*, 3 N. H. 41.

² Co. Lit. 32 a. n. 10. *Green v. Harvey*, 1 Rolle's Abr. 680.

³ Dut. 53. *Sistare v. Sistare*, 2 Root, 468.

⁴ *Haworth v. Herbert*, Dyer, 106 b.

⁵ Co. Lit. 33 a. n. 8.

⁶ *Stearns*, 310. 1 *Swift*, 86. 4 *Dane*, 672-6. 4 *Kent*, 52. 1 *Virg. Rev. C.* 171. 1 *N. J. R. C.* 400.† 1 *N. C. Rev. St.* 615. *Ind. Rev. L.* 211. *Illin. do.* 238. *Miss.* St. 229.† *Dela. St.* 1829, 165.

* "*Concessio mirabilis et inaudita*." *Coke*.

† In this statute the old term of "*raviabur*" is used.

husband alone has power to obtain actual possession during coverture, and therefore a different rule would enable him at pleasure to debar his wife from her dower.¹

40. Thus where an heir dies before entry upon the land descended to him, or where a stranger enters by abatement; the widow of the heir shall still have dower.²

41. But if the heir married after the abatement, and died without taking possession; his widow shall not have dower, because during the coverture he had no seisin in law.³

42. So where the husband had only a remainder or reversion expectant upon a freehold, there shall be no dower.⁴

43. If a man leases for life, reserving rent to him and his heirs, and then marries and dies, his widow shall be endowed neither of the reversion nor the rent; because he had no seisin of the former, and only a particular estate, not an inheritance, in the latter. The same rule applies, where the particular estate terminates during coverture, either by limitation or forfeiture, but the husband does not actually enter. But if the life estate cease for a time, though afterwards reinstated, the widow of the reversioner has dower on account of the temporary seisin. Thus, if lessee for life surrender to the reversioner on condition, and enter for condition broken, the widow of the latter shall be endowed.⁵

44. A conveys to B in fee, and B, at the same time, reconveys to A and his wife, for their lives and that of the survivor. B conveys to C, subject to his deed to A. A and his wife and C jointly occupy the land. A dies, then C, then A's wife. C's wife remains on the land, and dower is assigned her; C's administrator having previously sold the land under a license from the court to D. E, a purchaser from D, brings a suit for the land against the widow, and recovers.⁶

45. It has been held in Pennsylvania, that there is no dower in a remainder expectant upon a life estate, which the husband has aliened before his death. Whether without such alienation there would be, qu.⁷

46. But where the lease is for years and not for life, the widow is entitled to a third of the reversion and a third of the rent, if any. If no rent is reserved, her judgment for a third of the reversion will be with a *cessat executio* during the term; or dower will be assigned with a proviso that the tenant for years shall not be disturbed.⁸ *

47. Devise to executors for payment of debts, then to the testator's

¹ Co. Lit. 31 a. Perk. 366.

² Lit. 448. Perk. 371.

³ Perk. 367. *Dunham v. Osborne*, 1 Paige, 635.

⁴ 2 Leigh, 30. 1 Sumner, 130. 7 Mass. 253. 1 Paige, 634.

⁵ Co. Lit. 32 a. Perk. sec. 366 & seq. Co. Lit. 31 a, n. 4.

⁶ *Fisk v. Eastman*, 5 N. H. 240. ⁷ *Shoemaker v. Walker*, 2 S. & R. 554.

⁸ Co. Lit. 32 b. *Wheatley v. Best*, Cro. Eliz. 564.

* Where a rent is reserved, the judgment for dower will be general, but the execution special; and the sheriff shall not oust the tenant, but merely enter and demand seisin for the widow.

son in tail. The son marries and dies before the debts are paid. Held, as the estate of the executors was only a chattel interest, the son had a seisin which entitled his widow to dower after payment of the debts.¹

48. By a Massachusetts colony law of 1641, the wife was allowed dower of a reversion or remainder. But this has been construed to mean, a reversion, &c. upon an estate less than freehold.² A statute of Maine provides for dower in estates in possession, remainder and reversion. In Connecticut, it is said, a reversion after a freehold is subject to dower.³

49. To entitle the widow to dower, the husband must have had the freehold and inheritance in him *simul et semel*. Thus, if A have an estate for life, remainder to B for life, remainder to A in fee, and A die living B; A's widow shall not be endowed. The same rule has been held, though the intervening estate is a mere possibility. Thus where A is tenant for life, remainder to B and his heirs for A's life, remainder to the heirs male of A's body; A's wife shall not have dower. And the prevailing modern doctrine is, that the interposition of a mere contingent estate between the husband's particular estate and his inheritance—notwithstanding a union *sub modo*—is sufficient to deprive the wife of her dower. Thus, where an estate is limited to A and B, for their lives, and after their deaths to the heirs of B; the wife of B shall not have dower. The learning upon this subject is said to be abstruse and unprofitable.⁴

50. Upon the principle above stated is founded the rule, that a widow is not dowable of lands assigned to another woman in dower—“*dos de dote peti non debet*.” When dower is assigned, the assignment relates back to the owner's death, and the heir is regarded as never having been seised of this portion of the land.⁵

51. A grandfather dies seised of land, from which his widow is endowed. Then the father dies, leaving a widow. The widow of the father shall have dower only in two thirds of the land, the other third being in the father's hands a reversion expectant upon a freehold, viz. the dower of the grandfather's widow.⁶

52. But in New York it has been held, that in such case the heir's widow shall have dower in the land assigned to the widow of the ancestor, after the death of the latter.⁷*

¹ 8 Rep. 96 a. *Hitchins v. Hitchins*, 2 Vern. 404.

² 4 Dane, 664.

³ 1 Smith's St. 170. *Reeve Dom. R.* 57.

⁴ *Moore v. Esty*, 5 N. H. 492. *Duncomb v. Duncomb*, 3 Lev. 437. 4 Kent, 40, n.

⁵ 4 Dane, 664. *Windham v. Portland*, 4 Mass. 388.

⁶ Co. Lit. 31 a, b. *Reynolds v. Reynolds*, 5 Paige, 161.

⁷ *Bear v. Snyder*, 11 Wend. 592.

* It would seem, that in making this decision, the Court overlooked the distinction laid down in the books which they cite, and noticed in ss. 51, 53, between the case where the son holds *by purchase*, and that in which he holds *by descent*. The point really decided is, that the heir is *seised* of the reversion expectant upon the widow's dower, which is a departure from the common law rule. The decision seems directly contradictory to 5 Paige, 161. (*supra* n. 6.)

53. If the grandfather conveyed to the father before his death, the widow of the father would have dower in the whole, subject to the dower of the grandfather's widow; because before the death of the latter the father was actually seised.¹

54. Judge Reeve supposes a case, where the widows of the grantor and of four successive purchasers, respectively, claim dower upon this principle in the same land.²

55. The same principle applies where the land has been sold on execution. A owns land, which is sold on execution against him to B. B dies, and then A. B's widow has dower in the land subject to the dower of A's widow.³

56. The above rule is not applicable, unless dower has been actually assigned to the first widow.

57. The widow of a devisee sues for and recovers dower in the whole land devised, the widow of the testator having never made any claim.^{4*}

58. But a release of her right by the widow first entitled to the tenant of the land, does not give the other widow dower in the whole.

59. Where two widows were entitled to dower in the same land, and the one having the prior right recovered judgment for her dower, but, without having it set off, conveyed it to the tenant; in a suit by the other widow for her dower, held, she could claim it in only two thirds of the land.⁵

60. It is said, that if the widow of a grantee sue the grantee's heir for her dower in the whole land, pending a suit against him by the widow of the grantor for her dower; the former suit shall await the judgment in the latter.^{6†}

61. It has been said, that an *instantaneous* seisin is sufficient to give dower; and a case is mentioned, where a father and son were hanged in one cart, and as the son appeared to survive the father by struggling the longest, the son's widow was endowed.⁷

62. But there is an instantaneous seisin of another description, which will not entitle the widow to dower. This is where the same act which gives the husband an estate, also passes it out of him, or where he is a mere instrument to pass the estate. Thus where land is conveyed to A to the use of B, A has but an instantaneous seisin, and his widow shall not have dower. So where A conveys to B and

¹ Co. Lit. 31 a, b. *Geer v. Hamblin*, 1 Greenl. 54 n.

² Reeve's Dom. Rel. 58.

³ *Dunham v. Osborn*, 1 Paige, 635.

⁴ 1 Cruise, 153. *Hilchins v. Hilchins*, 2 Vern. 403.

⁵ *Leavitt v. Lamprey*, 13 Pick. 382. (But see *infra* 64.)

⁶ Lit. 54.

⁷ 2 Bl. Com. 132. *Broughton v. Randall*, Cro. Eliz. 502.

* Mr. Cruise thus states the law. But the case (2 Vern. 403), which he cites, was one where the title of the former widow was disputed on the ground of a devise to her in satisfaction of dower.

† But Lord Coke says, "this shaft came never out of Littleton's quiver of choice arrows."

B at the same time mortgages back to A, or according to a previous agreement mortgages to C; the widow of B shall have dower only in the equity of redemption.¹ Otherwise where the reconveyance is subsequent in time to the original deed.

63. So where it was a condition of a sale of land to the husband that he should give back a mortgage of the land to secure the price, and a deed was made the day after the conveyance and signed by the wife, but she refused privately to acknowledge it; held she could not have dower.²

64. But where a vendor of land, having a lien for the price, brings a suit for it, recovers judgment, and sells the land upon execution; the lien is extinguished, and the widow of the first vendee shall have dower against the execution purchaser.³*

65. In Virginia, where the husband, receiving a deed of land, gave a deed of trust to secure the price, and the land was afterwards sold to raise the price, it was left a doubtful point whether the widow should have dower.⁴

66. It has been laid down, that where a widow demands dower from one claiming under her husband, he cannot dispute the husband's seisin.⁵ But this rule has been criticised, and the cases which have been supposed to establish it examined, by the Court in New Hampshire; and the conclusion is, that although there may be cases where the tenant is technically and absolutely *estopped* to deny the seisin of the husband under whom he claims, yet in general the husband's conveyance is only *prima facie* evidence of such a seisin as entitles the widow to dower. Thus the tenant may defend upon the ground that the husband had only a remainder after a freehold.⁶

67. It seems it is sufficient for the demandant in the suit for dower to prove that the husband was the reputed and ostensible owner; the tenant must then show a better title. A took possession of vacant land owned by the State, made improvements, and occupied fifteen years. The State granted the land to B, son of A, after A's death, reserving to the wife of A a life estate, in the same manner she would have been entitled to dower, if A had died seised in his own right. The wife of A brings an action for her dower. Held, A's possession was evidence of seisin and threw the burden of disproving it upon B; that A was seised against every body but the State, as a mortgagor is seised against all but the mortgagee; and that B had nothing to set up against the claim of dower except his grant, which expressly saved the right of dower. Judgment for the plaintiff.⁷

¹ Co. Lit. 31 b. 1 N. Y. R. S. 740. *Holbrook v. Finney*, 4 Mass. 566. *Clark v. Munroe*, 14, 351. 1 Bay, 312. 2 M'Cord, 54. *Ancots v. Catherick*, Cro. Jac. 615.

² *Bogie v. Rutledge*, 1 Bay, 312.

³ *M'Arthur v. Porter*, 1 Ohio, 102.

⁴ *Moore v. Gilliam*, 5 Mun. 346.

⁵ 1 Caines, 185.

⁶ *Moore v. Esty*, 5 N. H. 492.

⁷ *Smith v. Paysenger*, 4 Con. S. C. 62. *Knight v. Mains*, 3 Fairf. 41.

* Burnet J. dissented.

68. The last circumstance requisite to dower, is the death of the husband. This renders *absolute* and *consummate* an interest before *contingent* and *initiate*. Whether it must be a *natural* death, seems to have been an unsettled point in England; though the prevailing opinion is, that a mere *civil* death is insufficient to give dower. Mr. Dane remarks, that this question is not known ever to have been started in this country, or the existence of any such thing as a civil death contended for; although quakers and others have been banished, and many criminals are imprisoned, for life: but that in New York it has been decided they are dead in law. In South Carolina a husband banished has been held *civiliter mortuus*.¹

69. A natural death however may be presumed from circumstances (as has already been remarked²), and in such case the widow unquestionably has the same right to dower, as if the death of the husband were positively proved. The English statute (19 Cha. 2, c. 6) provides merely for the taking effect of remainders and reversions expectant upon life estates. But the principle of the statute has been extended to most other cases; more especially to those where the title to land is concerned, and the property would therefore remain unimpaired if the party should prove to be alive.* Thus where a husband had been more than seven years absent from the State, and it was reported that he was drowned; held, a second marriage by his wife was valid and entitled her to dower or a distributive share from the second husband's estate.³

70. A and B cohabited as man and wife. They separated in 1781, and in '83 B, the wife, removed from the State and was never afterwards heard of. In '81 A married again, lived with his second wife thirty-eight years, and died leaving children by her. Held, though the second marriage was void at its inception, yet a valid subsequent marriage might be presumed from the cohabitation and good character of the parties, and the wife was allowed dower.⁴

71. A party claiming under the heirs of the husband cannot deny his death.⁵

¹ 3 Mas. 368. 1 Cow. 89. Co. Lit. 33 b, 132 b. Jenk. Cent. Ca. 4. 1 Cruise, 124.
² Dane, 677. (See 15 Mass. 33.) Wright v. Wright, 2 Desaus. 244.

³ Ch. iv. s. 56.

⁴ Woods v. Woods, 2 Bay, 476.

⁵ Jackson v. Claw, 18 John. 346.

⁶ Hitchcock v. Carpenter, 9 John. 344.

* See 3 S. & R. 490.

CHAPTER IX.

DOWER. WHAT PERSONS MAY BE ENDOWED, AND IN WHAT THINGS.

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| 1. Aliens.
7. Dower—in what things.
8. Things incorporeal.
9. Mines and quarries.
12. Wild lands.
13. State of cultivation—what.
14. Improvement or depreciation by heir or purchaser.
21. Increase or diminution of value from extrinsic causes.
23. Land appropriated to public use. | 25. Mill and fishery.
26. Annuities.
27. Lands held by improvement, &c.
28. Lands contracted for.
31. Slaves.
32. Estates tail, &c.
35. Estates <i>pour autre vie</i> .
36. Estates for years.
37. Uses, &c.
38. Wrongful estates. |
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1. WITH respect to the persons who may take an estate in dower, the only personal disability seems to be that of aliens. At common law, an alien cannot *hold* real estate, acquired in any mode; and cannot even *take* it by *act of law*. An alien woman therefore cannot be endowed. A statute of Hen. 5 made an exception in favor of aliens claiming under a license of the king. And if naturalized, an alien, in general, shall have dower in all the lands of which the husband was seised during coverture.¹ Decided otherwise in New York.²

2. The rights and powers of aliens as to real estate will be considered hereafter.* In those States where they are authorized to hold lands, of course they are entitled to dower. But in some of the other States, a special exception from the common law rule has been made in favor of alien women and the widows of aliens.

3. In Massachusetts,³ alien women are dowable, except in land conveyed or levied upon before February 23, 1813. They are dowable also, if residents, in Maryland, and in New Jersey.⁴

4. In New York, the widows of aliens, who at their death were capable of holding lands, if such widows are inhabitants of the State, shall have dower.⁵

5. In Maine, the alien widow of a citizen is dowable.⁶

¹ 1 Cruise, 125. ² Chitt. Black. 103 n. 23. 1 Har. & G. 289.

³ Priest v. Cummings, 16 Wend. 617.

⁴ Mass. Rev. St. 411.

⁵ Buchanan v. Deshon, 1 Har. & G. 289. 4 Kent, 36.

⁶ 1 N. Y. Rev. St. 740. (See Mick v. Mick, 10 Wend. 379.)

⁷ 1 Smith's St. 170.

* See Alien.

6. In New York, the alien widow of a citizen, who was an inhabitant of the State when the act of 1802 was passed, enabling aliens to hold lands, is entitled to dower.¹

7. With respect to the things in which dower shall be had, the first and most comprehensive rule is that which has been already stated in giving the definition of dower; viz. that the widow shall be endowed of all lands and tenements in which her husband had an estate of inheritance at any time during coverture, and of which any issue that she might have had, might, by possibility, have been heir.² The last clause of this definition, in consequence of the peculiarities of American law as to *entailments*, seems to be, in this country, obsolete and superfluous. It is accordingly omitted in American statutes, which define dower, where any such exist.

8. Dower shall be had not only in lands themselves, but also in all incorporeal hereditaments that savor of the realty, because it is incident to the estates to which they are appendant. It is said, that in the United States dower is principally confined to houses, lands and mills.³

9. There shall be dower in mines or quarries, if they have been opened before the husband's death; otherwise, not.⁴ But it matters not whether they have been wrought by the husband or by his lessee, or whether he owned the land itself, or merely the whole stratum of the mine or quarry, upon the land of another.⁵

10. A husband died seized of a tract of land of four acres, consisting of a slate quarry mostly below, but partly above, the surface of the ground. One quarter of an acre of the quarry had been dug over, and the practice was to take a section of ten or twelve feet square on the top, go down to a certain depth, and then recommence on the top. Held, the whole quarry must be regarded as opened, and therefore subject to dower.⁶

11. Tenant in dower of coal lands may take coal to any extent from a mine already opened, or sink new shafts into the same veins of coal, or dig into a new seam through one already opened above it.⁷

12. The peculiar situation of the land in this country as to a very great extent wild and uncleared, gives rise to a question of dower, which seems unknown to the English law, viz. whether a widow shall have dower in *wild lands*. This question seems to be involved in another, viz. whether, if endowed of such lands, the widow could

¹ Priest v. Cummings, 16 Wend. 617.

² 2 Chit. Bl. 104.

³ 1 Cruise, 127. 4 Kent, 40. Buckeridge v. Ingram, 2 Ves. jun. 664. 4 Dane, 670.

⁴ Stoughton v. Leigh, 1 Taun. 402. (See 2 Adol. & El. 568-93. 1 Cow. 460-80.)

⁵ Billings v. Taylor, 10 Pick. 460.

⁶ Crouch v. Puryear, 1 Rand, 258.

⁷ Because to open them would be waste. If in any State, according to the established law, it would not be waste, it would seem to follow that dower should be allowed in a mine though unopened. (See infra 12, as to wild lands.)

clear them, without committing waste. The latter question will be noticed hereafter in connection with the subject of waste. It is sufficient to say here, that the former has been differently settled in different States. In Massachusetts and New Hampshire, there shall be no dower in wild lands, because the clearing of them would be waste and forfeit the estate. And there shall be no dower in such lands, whether the husband died seised of them, or whether they were conveyed by him and subsequently cleared by the purchaser. But the reason of the rule furnishes an exception to it. A widow shall be endowed of a wood-lot or other land used with the farm or dwelling house, though not cleared; because she would be entitled to *estovers* for the use of the house or cultivated land assigned to her, and at the same time could not lawfully take them as incident thereto, without a special assignment.¹ But it has been said in New Hampshire, that *perhaps* the widow might, without waste, cut *ordinary fuel*.² In those States, where either statutes or judicial decisions authorize a tenant in dower to cut trees and timber, it would seem to be necessarily implied, whether so expressly declared or not, that a widow is dowerable of wild lands.

13. A *state of cultivation* is the converse to a *state of nature*, and exists where lands have been wrought with a view to a crop, till they are abandoned for every purpose of agriculture, and designedly permitted to revert to a condition like the original one. It is not material, in regard to the question of dower, whether the lands have yielded an *income* or not. At common law, the income or annual value had no bearing upon the title to dower; and although a statute, after allowing to the widow one third of the husband's lands, adds that she shall have so much as will yield one third of the income which he derived from them, this is not to be regarded as any limitation of the right, but only as a secondary guide to the sheriff in making the assignment.³

14. Intimately connected with the subject just considered, is the question of a widow's right to dower in *improvements* made upon the land since the husband was in possession of it. These may be made, either by the heir, after the husband's death, and before assignment of dower, or by one who purchased the land from the husband in his life-time.

15. Where improvements are made by the heir, the widow shall be allowed the benefit of them.* The reason is said to be, that it is the folly of the heir not to assign dower before making the improvements. Another reason is, that, as will be seen hereafter, the assignment of dower *relates back* to the death of the husband, the heir is

¹ Conner v. Sheperd, 15 Mass. 164. Webb v. Townsend, 1 Pick. 21. White v. Wilks, 7, 143. Mass. Rev. St. 460. N. H. L. 190.

² 2 N. H. R. 56.

³ Johnson v. Perley, 2 N. H. 56. (But see 15 Mass. 167.)

* She cannot claim emblements.

regarded as never having been seised of this portion of the lands,* and, upon general principles, the improvements belong to the owner of the soil. Judge Story regards the latter as the true reason of the rule.¹

16. On the other hand, it is said that if the value of the land is impaired in the hands of the heir, dower shall still be assigned according to the value at the time of assignment. Whether such depreciation may not be taken into account, in estimating the damages awarded to the widow, qu. ?²

17. Where improvements have been made by one who purchased the land from the husband without any release of dower, it is the general rule that dower shall be estimated according to the value of the land at the time of transfer, whether the improvements be made before or after the husband's death, with or without notice of the widow's right of dower. The reason is said to be, that such purchaser, in a suit upon the husband's warranty, could recover only the value of the land without the improvements. Chancellor Kent remarks, that this reason has been ably criticised and questioned in this country,† but the rule itself is founded in justice and sound policy.³

18. In Pennsylvania and Ohio,⁴ dower is said to be estimated according to the value of the land at the time of application for dower without the improvements. In New Hampshire, a statute provides that where the husband has parted with his title, the widow shall be endowed of so much of the land as will yield one third of the income derived from it at the time of alienation.⁵

19. Where the husband conveyed the land by way of mortgage, but remained in possession and improved, and the mortgage was afterwards foreclosed, the dower shall be of the improved value, because the alienation is regarded by the law as made at the time of fore-

¹ *Powell v. M. & B. Manuf. Co.* 3 Mas. 347. *Gore v. Brazier*, 3 Mas. 544. *Humphrey v. Phinney*, 2 John. 484. *Taylor v. Broderick*, 1 Dana, 347. *Thompson v. Morrow*, 5 S. & R. 289. *Ayer v. Spring*, 10 Mas. 80. Co. Lit. 32 a. and n. 8.

² Co. Lit. 32 a. 3 Mas. 368.

³ 3 Mas. 370. 10 Wend. 480. *Waters v. Gooch*, 6 J. J. Mar. 591. 4 Kent. 65.

⁴ 5 S. & R. 289. *Purd. Dig.* 221, n. *Walk. Intro.* 327. *Danforth v. Bank, &c.* 6 Ohio, 77.

⁵ N. H. L. 1829, p. 510.

* This is the English doctrine. It seems to be somewhat shaken in the United States. (See Descent.)

† Particularly by Judge Story (in 3 Mas. 369-70), and Ch. J. Tilghman (in 5 S. & R. 289). For, supposing the husband conveyed without warranty, the widow (it seems) would still have no dower in the improvements. The former learned judge also criticises another reason which has been sometimes assigned, viz. that the husband was not the owner of the improvements, and dower is allowed only in what the husband owned. For the same reason would prevent dower in improvements made by the heir, which is always allowed. The rule may have originated in the policy of promoting the prosperity of the country by encouraging improvements in agriculture and building; and in an anxiety to promote alienations and subinfeudations, and thus to disentangle inheritances from some of their numerous burthens.

closure.¹ So, if the husband, having mortgaged, make improvements, and then convey the land, the widow shall have dower of the value at the time of the latter conveyance.²

20. If a purchaser from the husband, instead of making improvements, impair the value of the property, as by tearing down buildings, it seems the wife has no remedy against him, her title being merely initiate at that time.³

21. Where, since the conveyance made by the husband, the land has risen in value from extrinsic causes, such as the increase of commerce or population in the neighborhood, it seems to be an unsettled point whether the widow shall be endowed of the original or the increased value. The former standard has been approved in New York and Virginia, and the latter in Massachusetts, Pennsylvania, Kentucky (it seems) and Ohio.⁴ Judge Story suggests a distinction, between the case where an erection upon a part of the land itself increases the value of the remainder, and an increase of value arising from causes unconnected with such erection; and also between erections which in themselves raise the value of the land, and those which increase it by the business carried on and the capital employed in them, such as manufactories. His conclusion is, that dower is to be allowed according to the value of the land at the time of assignment, excluding all the increased value from the improvements actually made upon the premises by the alienee; leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements.⁵ On the other hand, the Court in New York hold, that both at common law and by a fair construction of the statutes of the State, the widow shall have her dower according to the value at the time of alienation, whether it has since increased or diminished.⁶

22. In Virginia, it has been held, that the widow cannot claim one third of the *proceeds* of land sold by the husband.⁷

23. In England, Magna Charta provides that a widow shall not be dowable of a *castle or fortress*.⁸ No case probably has occurred or will occur in this country for the application of this particular rule. But an *analogous principle* has been adopted in one instance in Ohio.

24. Several owners of land in Cincinnati, of whom A was one, mutually agreed to appropriate their land to public use for a street and a market house. The city council carried the appropriation into effect by erecting the house; but A never conveyed the land on which it stood. Held, A's widow could not have dower in the market house, for the same reason that in England a woman was not dowable

¹ Hale v. James, 6 John. Cha. 258.

² 3 Mas. 459.

³ 3 Mas. 367.

⁴ 4 Kent, 66-7. 5 S. & R. 289. 3 Mas. 375. 11 John. 510. Walker v. Schuyler, 10 Wend. 480. Tod v. Baylor, 4 Leigh, 498. Dunseth v. Bank, &c. 6 Ohio, 76.

⁵ 3 Mas. 375.

⁶ 11 John. 510. 13, 179. 6 John. Cha. 258.

⁷ Fitzhugh v. Foote, 3 Call, 13.

⁸ 1 Cruise, 129.

in a castle : it could yield nothing to her support by a direct participation in the possession, without such an interference with the public right to control the whole subject, as to render its enjoyment inconvenient and unsafe, if not impossible.¹

25. There shall be dower from the profits of a mill or fishery.²

26. In Virginia, dower is allowed upon annuities as well as rents, charged upon or issuing out of real estate.³

27. In Pennsylvania, in lands held by improvement or by warrant and survey ; but not in those held by warrant merely.⁴

28. In Illinois and Virginia, in lands merely contracted for, where the title may be completed, although (in Virginia) the contract were parol. In Kentucky, in lands contracted for by bond. But dower is allowed in such lands, only where the husband holds the contract *at his death* ; not where he has assigned it.⁵

29. As there cannot be two cotemporary rights of dower in the same land, the widow of an *obligor* is not entitled to dower. But if instead of requiring a specific performance, the obligee sues and recovers damages for a breach of the bond after the obligor's death, the widow of the latter is restored to her dower.⁶

30. In Ohio, dower shall be had in all lands in which the husband was interested by bond, article, lease, or other evidence of claim. So in land which he purchased without deed, paying a part of the price, and afterwards making improvements. But only in such estates of this description as the husband owned at his death.⁷

31. In Virginia, Kentucky and Missouri, dower is expressly allowed in slaves. But in Virginia and Kentucky, the right is confined to such slaves as were in possession of the husband at his death.⁸ And in Kentucky, it has been held that there shall be no dower in slaves emancipated by the will of the husband.⁹

32. It has been seen, that in general all *estates of inheritance* are subject to dower. Thus there is dower in *base* or *qualified* fees. So also in *estates-tail*.¹⁰ And a liability to dower has even been mentioned as the distinguishing criterion of an estate tail.¹¹ With respect to qualified and conditional fees, substantially the same remarks will apply to curtesy* and to dower.

33. Devise to A and his heirs forever, (charged with an annuity) ; and if A should have no issue, upon his death to the heir at law,

¹ Gwynne v. Cincinnati, Ohio R. 459.

² Co. Lit. 32 a. ³ Anth. Shep. 477.

⁴ Pard. Dig. 221.

⁵ Illin. Rev. L. 627. Rowton v. Rowton, 1 Hen. & M. 91. Dean v. Mitchell, 4 J. J. Mar. 451. Stephens v. Smith, Ib. 66. Hamilton v. Hughes, 6 Ib. 582.

⁶ Dean v. Mitchell, 4 J. J. Mar. 451.

⁷ 2 Chase's St. 1314. Smiley v. Wright, 2 Ohio, 507.

⁸ Anth. Shep. 483, 648. Smiley v. Smiley, 1 Dana, 94. Misso. St. 1836, 61.

⁹ Lee v. Lee, 1 Dana, 48.

¹⁰ 1 Cruise, 127. Buckeridge v. Ingram, 2 Ves. jr. 664. 4 Kent, 40.

¹¹ 3 P. Wms. 263.

* See ch. 6, s. 24.

subject to legacies to be given by A to the younger branches of the family. A dies without issue. A's widow has dower.¹

34. In the case of an estate tail, it has been seen that curtesy does not cease with a determination of the estate from or in connection with which it arises.² But there are several instances, where such determination puts an end to the curtesy of the husband and to the dower of the wife. 1. Where there is an eviction by paramount title ; 2, an entry for breach of condition ; 3, where a qualified or base fee terminates by its own limitation ; 4, where a fee terminates by the happening of an event on which it is made determinable. Or, in general, the estate is terminated by every subsisting claim or incumbrance in law or equity existing before the inception of the title, and which would have defeated the husband's seisin.³ It has been said, that estates tail are subject to dower, because they may in certain ways be enlarged into estates in fee simple. But this has lately been declared an erroneous opinion ; since dower was allowed both in conditional fees when first introduced, and also in estates tail after the statute *de donis*, and before the introduction of the common recovery for the purpose of barring them.⁴

35. An estate *pour autre vie* is not subject to dower. Thus, where one purchases the life estate of a tenant by the curtesy initiate sold upon execution, the widow of such purchaser has no dower.⁵

36. In Massachusetts, estates for years where the term was limited for a hundred years or more, and fifty years remain unexpired, are subject to dower, the dowress paying one third of the rent, if any.⁶ In Missouri, there is dower in leaseholds for more than twenty years.⁷

37. The subject of dower in uses and trusts, equities of redemption, and equitable estates generally, rents, commons, joint tenancies, &c., will be considered hereafter under those respective titles.

38. There shall be no dower in a *wrongful* estate. Thus, where a man has a title to land, and a *right of action* to assert it, but no *right of entry*, and he enters and dies ; although his heir is *remitted* to the rightful estate, the widow shall not have dower.⁸

39. But the wife of a disseisor shall have dower till the disseisin be defeated.⁹

40. An ancient English statute (Westminster 2, c. 4), provides, that where the husband gave up his land to an adverse claimant collusively, by default, the wife may claim dower and compel the tenant to prove his title. A similar act has been passed in New York, Missouri, Ohio and Kentucky.¹⁰

¹ *Moody v. King*, 2 Bingh. 447.

² (See Co. Lit. 241 a.) 10 Rep. 97 b. 4 Dane, 667. 4 Kent, 49.

³ 2 Bing. 452.

⁴ *Mass. Rev. St.* 411.

⁵ 1 Cruise, 128.

⁶ 1 N. Y. Rev. St. 742. *Misso. St.* 228. *Walk. Intro.* 325. 1 Ky. Rev. L. 581.

⁷ Ch. 6, s. 26.

⁸ *Gillis v. Brown*, 5 Cow. 388.

⁹ *Misso. St.* 228.

¹⁰ 4 Dane, 668.

CHAPTER X.

DOWER, HOW BARRED.

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| <ol style="list-style-type: none"> 1. Inchoate right. 2. Crime of husband. 3. Detinue of charters. 5. Transfer by the husband. 8. Exchange of lands. 9. Equitable bars of dower. 10. Implied " " 12. Partition. 13. Deed of wife in England. 14. Fine, &c. " " 15. Deed of husband alone, and sale of land for debts. 20. Deed of husband and wife. | <ol style="list-style-type: none"> 32. Wife's release, when void in Equity. 34. " " can operate only as such. 35. Devise or legacy, when a bar. 43. When an implied bar, in law or equity. 54. Legacy to widow, how regarded. 56. Apportionment of legacy. 57. Disposal of legacy, when renounced. 58. American law as to devises in bar of dower. 61. Election between a devise and dower. 63. Time of election. 64. Mode of election. |
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1. THE inchoate right of a wife to dower attaches at the instant of the marriage. Such right however may be barred or defeated by several circumstances, some of which have already been incidentally noticed,* but which will now be considered more at length.

2. Anciently in England, an attainder of treason or felony against the husband was a bar of dower. The principle was variously modified by successive statutes. In the United States, forfeiture of estates for crime is for the most part abolished. And where lands have been confiscated by express legislation for adherence to the public enemy, dower has still been allowed. In New Jersey it is expressly provided by statute, that the right of dower shall not be affected by the crime of the husband.¹

3. Another circumstance, which by the English law bars or defeats dower, is *detinue of charters*; by which is meant a detention or keeping back by the widow of the charters or title deeds of the estate from the heir. This circumstance is of rare occurrence in the United States, and it is not known that any case upon the subject is to be found in the American Reports.²

4. The charters must relate to the lands in which dower is claimed, and the tenant by his plea must show the certainty of the charters, so that an issue may be joined. A stranger cannot set up this defence, even though the charters were conveyed to him by the husband. He who pleads detinue of charters, ought to plead that he has been always ready and yet is to render dower, if the demandant would deliver them.³

¹ *Palmer v. Horton*, 1 John. Cas. 27. *Sewall v. Lee*, 9 Mass. 363. 2 Bay, 20. 1 N. J. Rev. C. 263.

² 9 Rep. 17 b. Hob. 199. 4 Dane, 666.

³ *Stearns*, 310.

* See *Adultery, Divorce, Elopement*.

5. Inasmuch as a widow is dowerable of all lands, &c. of which the husband was seised during coverture, it follows of course that no transfer by the husband of land once acquired and owned after the marriage, will bar or defeat the wife's dower. Nor will even the release and extinguishment of a rent in which she is dowerable, bar her right to dower therein.¹

6. Where a husband conveys away his land on the very day of his marriage, the law, favoring dower, will intend the marriage to have preceded the conveyance, and the widow shall have dower.²

7. The principle above stated, although undoubtedly in force in this country as a rule of the common law, has been recognised and affirmed in many of the States by express statute. In Indiana, it is provided that the wife shall not be barred of her dower by any *decree, execution or mortgage*, to which she is not a party.* In Missouri, the laches, default, covin and crime of the husband are also guarded against. In Tennessee, it has been decided, that the title of a widow is paramount to the rights of creditors, claiming after the husband's death.³ (See *infra* 16).

8. There is one instance in the English law, where a transfer by the husband alone will operate as a bar of dower. This is the case of an *exchange* of lands.† In such case, the widow must elect to be endowed either of those given or those taken in exchange—she cannot have dower in both.⁴ The form of conveyance known to the English law technically as an exchange, is but little if at all practised in the United States. But Mr. Dane lays down the principle above stated as being in force in American law. It has been recognised in Kentucky and New York.⁵

9. In Equity, a mere agreement by the husband to convey the land, if made before marriage and enforced after, bars the widow of her dower. The husband is regarded as never having been seised during coverture.⁶ And it is said to have been held in Ohio (probably in Equity, upon the principle of an equitable estoppel), that where a widow was present at a sale of the land by the administrator, having previously agreed to it, and not dissenting at the time, and the land was sold free from dower, and brought a larger price in consequence, she is barred of her dower though the purchaser knew of her

¹ 4 Kent, 50. *Abergavenny's case*, 6 Co. 79.

² *Stewart v. Stewart*, 3 J. J. Mar. 48.

³ Ind. Rev. L. 209. *Misso*, St. 228. *Combs v. Young*, 4 Yerg. 218.

⁴ Co. Lit. 31 b. ⁵ 4 Dane, 668. *Stevens v. Smith*, 4 J. J. Mar. 64. 1 N. Y. R. S. 740.

⁶ *Greene v. Greene*, 1 Ham. Ohio, 538.

* As dower is allowed in that State in all lands of which the husband was seised during coverture, the enumeration of these three modes of charge or transfer, of course does not enable the husband to bar dower in any other way—as for instance by an absolute deed.

† See "Exchange." In New Hampshire, where an exchange consists in merely giving land for land by deeds in common form, without the use of the word 'exchange,' the English rule does not apply. *Cass v. Thompson*, 1 N. H. 65.

claim.¹ In Virginia, both of the principles above stated have been suggested as doubtful and unsettled points; although in the case relating to the former, the husband had received the price of the land or a part of it, and the wife had notice of the contract before marriage; and in the case relating to the latter, the sale of the land was made to an innocent purchaser.²

10. The mere acceptance of a conveyance of the land in which a widow is entitled to dower, which impliedly disclaims such title, will not operate as a bar of dower. Thus, where A the widow, and B the daughter, of the deceased, held the land undivided, and upon B's marriage, she and her husband conveyed the land in settlement to trustees, of whom A was one, describing the land as B's property; held no bar of A's right of dower.³

11. Nor will a widow be barred of her dower by attempting to claim under a deed of the husband, which is avoided as fraudulent. Thus, where a husband conveyed fraudulently to the use of himself and his children, and contingently to the use of his wife, who did not sign the deed, and after the husband's death a creditor successfully sought to avoid the deed, the wife claiming under it; held, she should still have dower.⁴

12. It will be seen hereafter, that where the husband is a tenant in common, the right of dower is subject to the incident of partition.

13. At common law, the *deed* of a married woman is *ipso facto* void.⁵

14. In England, however, a widow may bar herself of dower by joining with her husband in a fine or recovery; but not by joining him in a mere deed. But various devices have been there resorted to, chiefly by way of complicated limitations, to effect this object. These are not practised, because, as will be seen, not necessary, in the United States.⁶

15. In the States of Vermont, Connecticut, Ohio, Tennessee, North Carolina and Georgia, a widow shall be endowed of those lands only of which the husband dies seised.⁷ Hence, if a man purchase lands, own them during coverture, but afterwards part with them; he thereby debars the widow's dower in those lands by his own separate act, and without any consent on her part.

16. In Pennsylvania, Missouri and Tennessee,⁸ dower is barred by a sale of the lands under a mortgage or judicial process. In Pennsylvania, this principle seems to be founded upon no express provision,

¹ Walk. Intro. 326. ² Smiley v. Wright, 2 Ohio, 509.

³ Braxton v. Lee, 4 Hen. & M. 376. Heth v. Cocke, 1 Rand, 344.

⁴ Wilcox v. Hubbard, 4 Mun. 346.

⁵ Blow v. Maynard, 2 Leigh, 30.

⁶ 3 Mas. 351.

⁷ 1 Cruise, 139. 4 Kent, 50.

⁸ Reeve, 40-1. 4 Kent, 41-2. 1 N. C. Rev. St. 613. Prince's Dig. 249.

⁹ 4 Kent, 42. Pur. Dig. 221. 4 Griff. 781.

but upon a mere construction of the statutes on this subject. In the same State, where the husband, being insolvent, conveys to trustees for payment of debts, his widow shall have dower, and she shall have one third of the rents and profits till creditors compel a sale of the land for debts, though by such sale her dower will be lessened.¹ It is undoubtedly a universal principle, that any fraudulent conveyance by the husband is void against the claim of dower. In North Carolina a statute so provides.²

17. In Delaware,³ a statute of 1816 provides that a widow shall have dower in all lands owned by the husband during coverture, free from all conveyances, debts, liens, &c., excepting any lien or incumbrance existing before the passage of the act. And it is said that previously dower was subject to debts.

18. In North Carolina it has been held, that the widow shall have dower in lands sold after the husband's death under a *fi. fac.* tested and levied before.⁴

19. In Ohio, a very recent act provides that the husband of an *insane* woman may convey his land, free from the incumbrance of dower.⁵

20. But in all the States, the most usual mode of barring dower, is by a deed of the husband in which the wife joins, and which contains at the close an express relinquishment of dower. In many of the States, this method is prescribed by express statutes, and added as an exception or qualification to the common law definition of dower.* * In Massachusetts, the practice was referred by one distinguished jurist to early colonial and provincial acts, and by another to New England common law.⁷ A statute of Georgia recites, that the conveyance of the lands of a feme covert by fine and recovery was never practised in any of the American colonies.⁸

21. In many States, a private examination of the wife is required to render her release of dower valid, and seems to have been practised before any statutory provisions requiring it. Substantially the same provisions are made, with regard to a release of dower, and a conveyance by the wife of her own lands, which has been already treated of, and to the remarks concerning which the reader is referred.⁹

22. In Massachusetts, it was remarked by Parsons C. J.,¹⁰ that a release of dower has been sometimes effected by a separate deed of

¹ 2 Yeates, 300. Kreider v. Kreider, Miles, 220. ² 1 N. C. Rev. St. 613.

³ Dela. St. 1829, 167.

⁴ Frost v. Etheridge, 1 Deve. 30.

⁵ Oh. St. 1836-7. Mar. 29.

⁶ 4 Kent. 58. 3 Mas. 351. Lufkin v. Curtis, 13 Mass. 223.

⁷ Fowler v. Shearer, 7 Mass. 20-1. 3 Mas. 351-2.

⁸ Anth. Shep. 592. ⁹ Supra, p. 54. Anth. Shep. 593.

¹⁰ 7 Mass. 20.

* That is, "a widow shall be endowed," &c., unless she have parted with her right, in the method prescribed. In Massachusetts, the practice in question has been referred to clauses of this nature in the early colonial and provincial statutes, implying and recognising, though not creating, the power of a feme covert thus to bar her dower. Col. St. 1644. Prov. St. 9 Wm. ch. 7. 3 Mas. 351-2.

the wife, subsequent to that of the husband, and reciting the sale by him as the consideration. But the Revised Statutes¹ provide that the husband shall join in the subsequent deed. And Judge Story supposes, that Judge Parsons's remark² was by him applied, and is applicable, only to the case, where the wife's deed, though subsequent, is made on the same day and as part of the same transaction with the husband's, and that this course was *sometimes* adopted, but not so generally as to give it the validity of a usage. If the wife's deed be seven months subsequent to the husband's, given after two mesne conveyances, for a new consideration, and not reciting the husband's sale as the consideration; it is void. This is not *joining* in the deed of the husband, according to the words of the statutes. Nor does the husband's mere assent make any difference.³

23. In Kentucky, the wife may release by a subsequent deed.⁴

24. A release of dower before marriage is void.⁵

25. In New Hampshire, the wife may release alone.⁶

26. The wife cannot release to the husband.⁷

27. In Massachusetts, merely joining in the husband's deed is insufficient, without words of release. But in Maryland, the deed may bar dower, though the wife be not named in it.⁸

28. Where a wife releases her dower, and afterwards the purchaser from the husband recovers damages of him for a breach of the covenant that he had a right to convey, there being attachments on the land at the time of conveyance; the release of dower becomes void, because the recovery in this action debars the purchaser from afterwards claiming any thing by his deed.⁹

29. If the certificate of the wife's acknowledgment of her release is in the usual form, and *substantially* conformable to the statute; the release will be valid.¹⁰

30. The wife may validly join in a lease, as well as an absolute deed. In such case she shall be endowed of the rent.¹¹

31. In Alabama, by a very recent act, an infant may release dower. But it has been recently held in New York, that a release of dower, though a substitute for the old process of a recovery, does not so far partake of the nature of the latter, as to render valid the release of an infant. Nor does a private examination give validity to such release. So held in Kentucky. Nor is a release of dower, like a *fine*, made valid by mere *consent* of the husband.¹²

¹ Mass. Rev. St. 410.

² 3 Mas. 353.

³ Powell v. Monson, & Co. 3 Mas. 347.

⁴ 1 Ky. Rev. L. 436.

⁵ Hastings v. Dickinson, 7 Mass. 155.

⁶ Ela v. Card, 2 N. H. 176.

⁷ Rowe v. Hamilton, 3 Greenl. 63.

⁸ 3 Mas. 347. Catlin v. Ware, 9 Mass. 218. 1 Md. L. 128.

⁹ Stinson v. Sumner, 9 Mass. 143.

¹⁰ Brown v. Farran, 3 Ohio, 151.

¹¹ Herbert v. Wren, 7 Cranch, 370.

¹² St. of Ala. 1836, no. 22. Priest v. Cummings, 16 Wend. 617. Jones v. Todd, 2 Mas. Mar. 361, 3 Mas. 356.

32. It has been seen, that in Equity, which regards a conveyance agreed to be made as actually made, dower may sometimes be barred even without any release. On the other hand, Equity will sometimes allow dower even after a release, where the deed was merely preparatory to another deed which has never been made.

33. Thus, where several tenants in common, with their wives, conveyed lands, previously lotted out, to a trustee, to be sold in lots; held, the widow of a deceased tenant should have equitable dower in those lots which the trustee had neither conveyed nor contracted to convey.¹

34. A release of dower can operate only as a release, not as the transfer of an independent estate. Thus, where a husband, whose land is bound by the lien of a judgment, conveys the land with a release of dower, and it is afterwards sold under the judgment, the purchaser from the husband cannot claim as an assignee of the wife, or as deriving a distinct estate from her, against the execution purchaser.²

35. A very common method of barring dower is by a devise or bequest from the husband to the wife. Upon this subject, the English law has been thus stated: Every devise or bequest in a will imports a *bounty*, therefore cannot, in general, be averred to be given as a satisfaction for that to which the devisee is by law entitled; hence a devise is no bar of dower, unless so expressed in the will, either at law or in equity. The Court will go as far as it can not to exclude the claim to dower.³ Several English cases sustain this doctrine.

36. A person, being indebted, devised part of his lands, which were subject to a satisfied mortgage, to his wife, but not in bar of dower, and the residue to his executors till his debts were paid. The wife having recovered dower at law, the heir brings a bill in equity for relief. Held, the devise was no bar of dower.⁴

37. A devised lands to his wife for life, and other lands to his brother in fee. The former lands were of greater value than the wife's dower. Held, both in law and equity, the devise was no bar of dower.⁵

38. More especially does this rule apply, where the devise is made for the term of widowhood of the wife, or is in any other respect less beneficial than dower.

39. A devises to his wife lands for her widowhood, afterwards, with all his other lands, to trustees for a term of years, for payment of debts and legacies; and directs, that after the expiration of two years of the term, the trustee shall permit her to receive the rents and profits of another farm, for the rest of the term during her widowhood. The widow having recovered her dower at law, and an application

¹ Hawley v. James, 5 Paige, 318.

² Douglass v. M'Coy, 5 Ohio, 527.

³ 1 Cruise, 139. Walk. Intro. 395. Jac. 503.

⁴ Hitchin v. Hitchin, Prec. in Cha. 123.

⁵ Lemon v. Lemon, 8 Vin. Abr. 366.

in Chancery for an injunction having been granted; upon a re-hearing in the latter Court, it was held, that even at law the devise was no bar of dower, and if it were so at law, it would not be in Equity; and the decree was reversed.* This judgment was afterwards affirmed in the House of Lords.¹

40. But where a devise or bequest is expressly given as a satisfaction, substitute, or recompense for dower, or upon condition that the wife shall not claim dower, she is bound to elect between the two, and an election of one is a perpetual waiver of the other.²

41. Nor is it material, whether the property given by will consist of real estate or personal, except perhaps that to make personal property a bar of dower, stronger proof of an intent to that effect is required, than in case of a devise of lands. But if, after she has elected and enjoyed the provision by will, it from any cause fails, as, for instance, if personal property from which an annuity is to be raised, becomes exhausted, it seems she may claim her dower.³ In Massachusetts, Maryland† and Virginia, express statutes so provide.⁴ But where a testator devised to his wife his whole estate *during widowhood*, and she makes no renunciation of the devise, but afterwards forfeits it by marriage, she shall not have dower.⁵

42. So, in New York, where a testator, in lieu of dower, devised certain property to his wife, and directed that his sons should annually deliver to her a certain quantity of wood; and after the widow had accepted the devise, and for many years enjoyed the property, the sons failed to deliver the wood as directed: held, the widow could not claim dower, but her remedy was under the will against those chargeable with its execution; that, although the wife would not be bound by a post-nuptial *agreement* merely, yet she would be bound by an *election* to avail herself of such agreement; and in this respect a devise stood on the same footing with a settlement made upon the wife after marriage.⁶

43. A provision by will, though not *expressed* to be a bar of dower, shall still operate as such, if its fulfilment is manifestly inconsistent therewith. It is said, that no person shall dispute a will who claims under it, and this rule is as applicable to a dowress as to any other person. Hence, where the dowable estate is so divided, that the claim of dower makes a material change in the will itself, the widow is barred. There is no difference between declaring that she shall not hold both, and devising so that she cannot hold both without disturbing the will.⁷

¹ *Lawrence v. Lawrence*, 1 Lord Ray. 438. 2 Vern. 365. 3 Bro. Parl. Ca. 483.

² *Leake v. Randall*, 4 Rep. 4 a. *Bush's Case*, Dyer, 220.

³ *Goaling v. Warburton*, Cro. Eliz. 128. (See *Ayres v. Willis*, 1 Vez. sen. 230.)

⁴ Mass. Rev. St. 411. Anth. Shep. 451. 1 Vir. Rev. C. 171.

⁵ *Vance v. Campbell*, 1 Dana, 229.

⁶ *Kennedy v. Mills*, 13 Wend. 553. Ib. 556.

⁷ 4 Kent, 56. *Villa, &c. v. Galway*, 1 Bro. Rep. 293 n.

* Because, as is said, the matter had been previously settled at law. 1 Ld. Ray. 438 n.

† "If nothing shall pass by such devise."

44. This doctrine seems to have been first settled in Courts of Equity, and a devise has therefore been called *an equitable bar*. But the language of the modern cases and the better opinion seems to be, that if the wife has fairly and understandingly made her election between her dower and the testamentary provision, and in favor of the latter, she will be held to her election at law as well as in Equity. There is no difference in principle between the Courts of law and Equity on this subject. The difficulty of reaching the justice of the case has frequently thrown these questions into Equity.¹

45. Equity will not interpose to compel an election, unless 1, the devise is expressed or strongly and necessarily implied to be a substitute; 2, clearly inconsistent with dower; 3, where the whole will would be overturned by an allowance of dower.²

46. Instances of inconsistency, are where the interest of one third of the amount of sales of the whole land is given to her for life. So where the rents of lands are charged with the maintenance and education of children, and provision is made for selling lands to pay debts.³

47. A testator devises one third of his estate to his wife, the other two thirds to his two children. Held, the widow could not claim both the devise and her dower.⁴

48. A devised to his wife an annuity of £200, to be issuing out of his lands, with power of distress and entry; subject thereto, he devised his real estates to his daughter in strict settlement; and directed all his personal estate to be invested in land and settled to the same uses. It was held in Equity, that the claim of dower was inconsistent with the will, 1. Because it would deprive the trustees of their possession of a part of the land, whereas by the will they were to hold the whole, subject to the annuity and distress, and the widow was to enter only upon non-payment. 2. Because it would diminish the annuity itself, inasmuch as by entering upon a third of the land in right of her dower, the widow would sink so much of her annuity as that third ought to bear in proportion. The annuity, being charged upon the whole land, could not, by an equitable marshalment, be thrown upon the remaining two thirds.⁵

49. In some later cases, the charging of an annuity upon lands has been held not to be a bar of dower.

50. Where a testator, not noticing his wife's title to dower, devises to her the residue of his personal estate, this is no bar of dower, because the claim of the latter does not break in upon the will.⁶

¹ 13 Wend. 555. 4 Kent, 56. French v. Davies, 2 Ves. jun. 578. (But see 2 Con. S. C. 748.)

² Kennedy v. Nedrow, 1 Dall. 418.

³ Duncan v. Duncan, 2 Yeates, 302. Herbert v. Wren, 7 Cranch, 370.

⁴ 4 Dane, 680. ⁵ Villa Real v. Galway, 1 Bro. Rep. 292.

⁶ Ayres v. Willis, 1 Ves. 230. In this case, the claim of a widow as devisee is compared with that of a child. (See further 2 Ves. & Beam. 222; Jac. 503.)

51. And if only a part of the lands subject to dower are devised to the widow, she may claim her dower in the residue, unless the intent is clearly otherwise. So the devise of a contingent remainder in the whole lands to the widow is no bar of her immediate title to dower by implication, because the two estates are not incompatible. Nor will the widow be barred of her dower, although there is a probability that the husband was ignorant of her right to claim it.

52. Where the husband devises his lands, or all his estate, to trustees, charged with an annuity to the widow ; dower being a paramount claim, equity will not presume, from his having disposed of all his own property, that he meant also to dispose of what was not his own, unless peculiar circumstances justify such construction.¹

53. If the lands subject to dower would be insufficient to meet the charges made upon them, dower would probably be barred ; and, it seems, a reference may be granted to ascertain the fact.²

54. A widow, receiving a legacy for her release of dower, is deemed a purchaser, and shall be fully paid before other legatees ; even though the legacy be not the only consideration of such release. Her claim is even paramount to that of *creditors*. By relinquishing her dower, she discharges a highly favored debt due from the testator ; and relieves his real estate from a lien in her favor, which would have preference to any that he himself could have created. Hence, where the widow filed a creditor's bill in Chancery, praying a sale of the real estate, for payment of debts ; and subsequently presented a petition, alleging that she accepted a devise from the husband improvidently, that the estate was greatly charged with debts, and that she should receive no compensation for her dower, and praying to be let into the latter ; it was held, that although she could not waive her election of the devise, affirmed by her bringing this suit, in the absence of any fraud or mistake ; yet, according to the language of the statute (of Maryland) she was "a purchaser with fair consideration," both at law and in equity, and that the creditors, having joined with her in an application for sale, could not now claim to be paid in preference to her, but in order to have equity, must do equity, and allow her legacy in full.³

55. Where devises and legacies are proportionably abated to make up the portion of a *post-testamentary* child, the widow's legacy shall be taken into account, in estimating the amount to be deducted from each of the other bequests. But the *post-testamentary* child, in order to claim a ratable portion of the widow's legacy, must take his share

¹ Lord Dorchester v. Effingham, Coop. 324. Hitchins v. Hitchins, Freem. 241. Ingleton v. Northcote, 3 Atk. 435. French v. Davies, 2 Ves. Jr. 577, 581. Foster v. Cook, 3 Br. 351. Wood v. Wood, 5 Paige, 596.

² Pearson v. Pearson, 1 Br. 292.

³ Anth. Shep. 451. Burrigge v. Brady, 1 P. Wms. 127. Blower v. Morret, 2 Ves. sen. 242. Heath v. Dendy 1 Russ. 545. Margaret, &c. 1 Bland, 203.

of the real estate subject to dower. In Illinois, a statute provides that if by the widow's renunciation of her legacy, other legacies are increased or diminished, the Court shall equalize them.¹

56. If the provision by will is stated to be for the widow's own support, and the support and education of her children, and she elects her dower; the bequest fails *in toto*, and cannot be apportioned for the benefit of the children.²

57. If the testator devises real and personal estate to the widow in lieu of dower, and the whole of his property, subject to such devise, to his executors in trust; and the widow afterwards elects her dower; the property included in the first devise does not pass by the second, but is distributed to the next of kin.³

58. The principles above stated belong to the English law, and, independently of statutory provisions, are generally adopted in this country. But in the States of Massachusetts, Vermont, Pennsylvania, Maryland, (with slight modification) Virginia, Illinois, New Hampshire and Alabama,⁴ the widow cannot claim both the provision made by will and dower also, unless such plainly appears to have been the testator's intention. In Pennsylvania, Maryland and Illinois, this intention must be shown by an express declaration in the will. In Alabama, where the devise is "not satisfactory" to her, the widow may waive it and claim dower.⁵

59. In Missouri and Delaware, the statutory provision applies only to a devise of *real estate*,⁶ and in Missouri dower only in land of which the husband died seised.

60. In South Carolina, it has been held, that although a Court of Chancery might *imply* a provision by will to be a bar of dower, a Court of Law could not do it.⁷

61. With regard to the time and mode in which an election shall be made, it is held in England, in those cases where the widow is bound to elect, that if she enters upon the estate devised and enjoys it, an election of such estate will be presumed. So, if she partially accede to a settlement, she will be bound for the whole. It is otherwise, where any act is done under an ignorance of her rights, or of the testator's circumstances.⁸

62. Though a devise be not made expressly in lieu of dower and therefore not a bar, yet the widow by her own acts may make it such. Thus if she contracts with the heir, reciting in the agreement, that she

¹ Mitchell v. Blain, 5 Paige, 588. Illin. Rev. L. 624.

² Hawley v. James, 5 Paige, 318.

³ Ib.

⁴ Herbert v. Wren, 7 Cranch, 370. 2 Yeates, 302. 1 Binn. 565. Mass. Rev. St. 410. Purd. Dig. 220-1. Anth. Shep. 50, 450. Illin. Rev. L. 624. N. H. L. 199. Alab. L. 884. ⁵ Alab. L. 258. ⁶ Misso. St. 228. Dela. St. 1829, 168.

⁷ Pickett v. Peay, 2 Con. S. C. 746.

⁸ Milner v. Harewood, 17 Vez. 150. Pusey v. Desbouvrie, 3 P. Wms. 321. Chalmers v. Storil, 2 Vez. and Bea. 225. Duncan v. Duncan, 2 Yeates, 305. Some of these cases sustain the principle stated in the text rather by analogy, than directly.

receives certain things in satisfaction of the devise and in lieu of dower ; she shall be barred of the latter. Dower, before assignment, being a right of action merely, may be released without formal conveyance, by acts and agreements.¹

63. A widow, to whom property was bequeathed not expressly but constructively in lieu of dower, having occupied the house devised to her, and received other property given her by the will and disposed of a part of it, fourteen years after the husband's death claimed her dower. Held, a reasonable time for her election had elapsed, and she could not now waive the devise.²

64. In the absence of any election, whether the widow shall take her dower or the provision made for her by will, seems to be a point somewhat differently settled in different States. In Ohio,³ if she fails to elect, the law gives her dower. But in Massachusetts, if the provision by will is more beneficial than dower, an acceptance of the former will be presumed.⁴ And the general rule is undoubtedly, that the widow will be understood to accept the devise or legacy, unless she expressly declare a contrary determination.

65. In many of the States, a definite time is fixed within which she shall make a formal election. In Massachusetts, Ohio, North Carolina and Illinois, within six months from probate of the will ; in Vermont, sixty days ; in Connecticut, the same, (from the time of exhibition of claims) ; in Maryland, ninety days ; in Missouri, twelve months.⁵ In Alabama,⁶ one year. In Pennsylvania and New York, one year from the testator's death ; in Pennsylvania, upon a summons from any party interested. In Delaware, thirty days from such summons. In Virginia and Kentucky, upon a renunciation within one year from his death, the widow shall be entitled to one third of the slaves for life.⁷

66. The statutes of the several States designate the form in which an election shall be made. It is done sometimes by a personal appearance of the widow before the court of probate, but generally by the filing of a written declaration which becomes matter of record. In Virginia and Kentucky, either openly in Court or by deed. In New York, by an entry upon or suit for the land.

67. But in New York it has been held⁸ in Chancery, that where a widow by deed relinquishes the testamentary provision, records the deed, and notifies the executors and trustees or the tenant of the land of her election, who thereupon recognise her right of dower and make

¹ Shotwell v. Sedam, 3 Ohio, 12.

² Reed v. Dickerman, 12 Pick. 146.

³ Walk. Intro. 325.

⁴ Merrill v. Emery, 10 Pick. 507.

⁵ Mass. Rev. St. 410. Walk. 325. Illin. Rev. L. 624. Anth. Shep. 50, 451. 1 N. C. Rev. St. 613. Dut. 53.

⁶ Alab. L. 258.

⁷ Anth. Shep. 483, 648. 1 N. Y. R. S. 742.

⁸ Hawley v. James, 5 Paige, 318.

payments on account of it; this is equivalent to the formalities prescribed by the statute and an entry upon or suit for any part of the lands is sufficient.

68. Another method of barring dower is by a *jointure*. This will make the subject of a distinct subsequent title.

CHAPTER XI.

ASSIGNMENT AND RECOVERY OF DOWER. FORMS OF PROCEEDING.

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|---|---|
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| 2. Nature of estate before assignment. | 45. Bill in Equity for dower. |
| 11. Tenancy in common with the heirs, in Massachusetts, &c. | 52. Assignment by Probate Court. |
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| 18. Quarantine. | 59. Forms of proceeding. |
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1. ALTHOUGH by the death of the husband the right of the widow to dower becomes consummate, yet, in general, she has no title to any specific lands and no right of entry upon them, until her dower is *assigned* or *admeasured* by the heir or other tenant of the freehold, or in a course of legal proceedings. She has only a *right in action*.¹

2. Upon this principle, a mere judgment for dower in a suit brought by the widow, gives her no right of entry like a judgment in other real actions; even though the dower is to be assigned in common, and will therefore be rendered no more certain by the assignment.²

3. In Pennsylvania, the widow of a tenant in common cannot before assignment maintain a writ of partition.³ But in New York, it is intimated, that although the widow is not properly made a party to

¹ Gilh. Ten. 26. 9 Mass. 13. 2 Cow. 638. 19 Wend. 528. 3 Ohio, 12. 13 Pick. 35.

² Hildreth v. Thompson, 16 Mass. 191. Co. Lit. 34 b.

³ Brown v. Adams, 2 Whart. 188.

a partition among heirs, devisees, &c., and cannot recover her dower by process of partition, where the husband was sole seised; she is a proper party to such partition, where he was a tenant in common.¹

4. So, in general, it is no defence to an ejectment against the widow brought by the heir for lands descended to him, or by a devisee, that he has failed to assign dower therein. That part of the land which the widow is specially authorized to occupy without assignment (as will be seen hereafter), is of course excepted from this remark.²

5. A quiet possession of the land, and actual receipt of the rents and profits for six years, is not equivalent to a legal assignment, so as to give the wife a freehold estate; but constitutes either a disseisin or tenancy at will.³

6. But after dower has been set off, the widow may enter before return of the writ.⁴

7. It has been held in New York,⁵ that before assignment the widow may release, but cannot transfer, her right, and in Maine and Kentucky,⁶ that it cannot be taken in execution. But in Ohio,⁷ a conveyance by the widow of her dower before admeasurement, is not void, and will not be set aside on application of a purchaser who has entered and enjoyed. He can only claim to have his title perfected. But no transfer can be made which will justify a suit for dower in the purchaser's own name.

8. The interest of the widow before assignment is not a proper subject of *lease*. Hence a covenant, in an instrument purporting to be a lease of such interest, to pay her a certain sum annually as a rent, in consideration of her forbearing to exercise her right to dower, is merely *personal*, and does not run with the land or bind an assignee of the supposed lessee. Neither can such transaction have the effect of a *release*, which must operate presently and absolutely.⁸

9. The widow having before assignment a mere *right of action*, this may be lost to her without the formality of a conveyance; as for instance, by an award.⁹

10. In Connecticut, upon a construction of the statute concerning dower, it has been held that immediately upon the husband's death, the widow becomes a tenant in common with the heirs, and may enter without assignment. She is not regarded as a tenant under the heirs.¹⁰ But in New York, the statute substituting ejectment for the former remedy of the writ of dower, has not the effect to make the widow a

¹ Coles v. Coles, 15 John. 319.

² Evans v. Webb, 1 Yeates, 424. Moore v. Gilliam, 5 Mun. 346.

³ Windham v. Portland, 4 Mass. 384.

⁴ Co. Lit. 37 b. n. 2.

⁵ 2 Cow. 638. 10 Wend. 414, 13. 524.

⁶ Nason v. Allen, 5 Greenl. 479. Shields v. Batts, 5 J. J. Mar. 15.

⁷ Todd v. Beatty, Wright, 461. Douglass v. McCoy, 5 Ohio, 527.

⁸ Croade v. Ingraham, 13 Pick. 35.

⁹ Cox v. Jagger, 2 Cow. 638. 3 Ohio, 12.

¹⁰ Stedman v. Fortune, 5 Conn. 462.

tenant in common with the heirs. Her title is still a mere right of action.¹

11. In Massachusetts,² the widow may occupy the land with the heirs, or receive one third of the profits, until they object. This was also allowed in England by the ancient law, as "*rationabile estoverium in communi*." But a lease by the widow is void.

12. In Maine,³ she shall have one third of the rents and profits till assignment, if the husband died seised.

13. These provisions were probably intended to give the widow a remedy only against the heirs; enabling her to recover the rents and profits from the husband's death without demand, and making the amount of them the measure of her damages. It seems, they do not authorize an *assumpsit* against any other tenant of the freehold than the heirs, thereby allowing the title to land to be tried in this form of action.⁴

14. In Equity, a formal assignment of dower is deemed unnecessary.

15. Thus, in New York, the widow's right may be reached by creditors before assignment by a process in Chancery.⁵

16. An infant heir brings a bill in Equity against the widow of the deceased for an account of rents which the latter had received as guardian. The widow was entitled to dower, but it had never been assigned. Held, she should be allowed, in accounting, one third of the rents.⁶

17. And the widow of a mortgagor may have a bill in Equity to redeem before any assignment of dower, because such assignment does not affect her right of redemption, and because she has no right to demand such assignment as against the mortgagee before she redeems. Nor is an assignment by the heirs necessary, because she could not redeem a part of the land without the whole.⁷

18. To the general rule that an assignment of dower is necessary to perfect the title of the widow, there is one exception. *Magna Charta* provided, that the widow might remain in her husband's capital mansion-house, with the privilege of reasonable estovers or maintenance, for *forty days* after his death, during which time her dower should be assigned. These forty days are called the widow's *quarantine*. Some have said that by the ancient law this time was an entire year.⁸

19. In most of the States, a similar provision has been expressly made by statute. In Massachusetts and New York,⁹ the widow is entitled to possession of the mansion-house for forty days. In Ohio,

¹ *Yates v. Paddock*, 10 Wend. 528.

² *Mass. Rev. St.* 410.

³ *Co. Lit.* 34 b. *Foster v. Gorton*, 5 Pick. 185. 1 *Smith's St.* 170.

⁴ *Gibson v. Crehore*, 3 Pick. 475.

⁵ 4 Kent, 61.

⁶ *Hamilton v. Mohun*, 1 P. Wms. 118.

⁷ *Gibson v. Crehore*, 5 Pick. 149.

⁸ *Co. Lit.* 32 b.

⁹ *Mass. Rev. St.* 411. 4 Kent, 62.

one year.¹ In Indiana,² Virginia, Kentucky, Rhode Island, New Jersey, Alabama, Illinois and Missouri, she may occupy till dower is assigned. In Illinois, Kentucky, Indiana, Missouri, New Jersey, Virginia and Alabama,³ she may also occupy the plantation or mesuage. In Massachusetts, the widow is also entitled to a support for forty days; in North Carolina, for one year.

20. In Virginia and Kentucky, if deforced before assignment, the widow shall have a *vicontiel* writ in the nature of a "de quarantina habenda."⁴

21. Quarantine is a *personal* right, and forfeited, by implication of law, by a second marriage.⁵

22. It is said, notwithstanding the widow's right of occupancy, the legal title is still in the heir. But it has been held in Missouri, that her right is assignable, and in Virginia, that the heir cannot maintain an action for a trespass to the mansion-house land.⁶

23. The widow's right to occupy the mansion ceases upon the expiration of the quarantine, though dower have not been assigned; and the heir may enter or bring a suit. Trespass lies against her, for, she being neither a joint-tenant nor tenant in common with the owner of the inheritance, the latter would otherwise be without remedy.⁷*

24. By the ancient common law, dower was assigned by the heir, subject to the judgment of the "*pares curiæ*," in case of any dispute. But the assignment might be made by any tenant of the freehold; and this seems to be the universal rule in the United States.

25. If the land is in possession of a wrongful occupant, as, for instance, a disseisor or abator, the widow is not bound in law to wait for her dower until the heir asserts his title, but may compel the *terre-tenant* to make an assignment. This will be valid, unless he is in possession by fraud and covin of the widow for the purpose of obtaining dower; in which case the heir may avoid the assignment, although equally made by the sheriff after judgment. None however can assign dower except those who have a freehold, and against whom an action would lie.⁸

26. Lord Coke says,⁹ if the husband have conveyed several lands to different persons, and one of them assign to the widow in satisfaction of her whole dower, the others cannot avail themselves of such assignment. But if a part of the lands descend to the heir, and he assign in full satisfaction of her whole dower, a grantee of another

¹ Walk. Intro. 231, 324. (1 N. C. Rev. St. 617.)

² Ind. Rev. L. 209.

³ 1 Vir. Rev. C. 170. Alabama L. 260. Misso. St. 229. Illin. Rev. L. 237. N. J. Rev. C. 397. 1 Ky. Rev. L. 573.

⁴ 1 Vir. Rev. C. 170.

⁵ Co. Lit. 32 b.

⁶ Branson v. Yancy, 1 Bad. & Dev. 77. Stokes v. McAllister, 2 Misso. 163. Latham v. Latham, 3 Call, 181.

⁷ Jackson v. O'Donaghy, 7 John. 247. M'Cully v. Smith, 2 Bai. 103.

⁸ Co. Lit. 35 a. 3 Co. 78. 4 Dane, 669.

⁹ Co. Lit. 35 a. (Perk. s. 402 con.)

* The action brought (in South Carolina) was trespass to *try title*. This or some other similar remedy must of course be requisite.

portion of the land, being sued, may vouch the heir, who may plead this assignment in bar, there being a privity between the heir and the grantee.

27. In Virginia, Kentucky, Missouri, New Jersey and Delaware,¹ statutes provide that it shall be no defence against a suit for dower, that another person has assigned it, unless this assignment be shown to be in satisfaction of dower from the lands in question.

28. In some cases, where the widow brings a suit against the tenant, and the latter vouches the heir, the tenant may "go in peace," and judgment shall be given against the heir alone. Thus, if the heir is vouched as having assets in the same county, which the demandant acknowledges, judgment shall be against the heir; otherwise, against the tenant, and for him over in value. If the heir has assets in the county only in part, the judgment is conditional.²

29. The right of the heir to assign dower is not impaired by the statutory provisions for such assignment, which exist in all the States, and will be hereafter mentioned.³

30. As has been already intimated, the widow may maintain an action for her dower, where it has not been voluntarily assigned her, against the heir, or the tenant or immediate owner of the freehold. If no dower has been assigned, the form of action is a writ of dower *unde nihil habet*; if it has been assigned in part, a writ of right of dower, which lies also in the former case.⁴ The writ *unde nihil habet* is the only one provided in Massachusetts, Maine, Virginia (it seems) and Kentucky.⁵

31. The writ of "*unde nihil habet*" lies only against a tenant of the freehold.⁶

32. A suit for dower in most of the States may always be brought at the election of the widow; and it is the only remedy, where the right is not conceded, but dower is claimed in lands of which the husband was not seised at his death;⁷ as, for instance, those which he conveyed or mortgaged without her signature to the deed. And if he conveyed different parcels to several persons, the widow shall be endowed proportionally from each, and they cannot be joined in suit. So it has been held in Kentucky, that the Probate Court cannot assign dower in an equitable estate. But if a mortgagee of the husband assent to an assignment by the Probate Court, although it has

¹ 1 Vir. Rev. C. 170. 1 Ky. Rev. L. 574. Misso. St. 231. 1 N. J. Rev. C. 398. Dela. St. 1829, 165.

² Co. Lit. 39 a, n. 6.

³ Moore v. Waller, 2 Rand, 418.

⁴ 4 Dane, 665, 672. Stearns on R. A. 300.

⁵ Mass. Rev. St. 616. 1 Smith's St. 168. 1 Ky. R. L. 573.

⁶ Miller v. Beverly, 1 Hen. & M. 368. Hurd v. Grant, 3 Wend. 340.

⁷ Sheafe v. O'Neil, 9 Mass. 9. Ind. Rev. L. 210. Rintch v. Cunningham, 4 Bibb. 462. Fosdick v. Gooding, 1 Greenl. 30. Hawkins v. Page, 4 Mon. 137. Watkins, 9 John. 245. Pinkham v. Gear, 3 N. H. 163. 5 Ib. 243. Co. Lit. 34 b. Ayer v. Spring, 10 Mass. 83. Illin. Rev. L. 236-7. Dela. St. 1829, 164. Taylor v. Brodrick, 1 Dana, 347. Vischer v. Conant, 4 Cow. 396. Ostrander v. Kneeland, 20 John. 276.

no jurisdiction in such case, the assignment will be good. Without such assent it would be absolutely void.

33. If the widow resorts to an action, the assignment is made upon execution by the sheriff, and in general upon a *view*. Hence a description by metes and bounds in the writ is unnecessary. In Illinois, such description is given in the judgment upon petition, and in Kentucky, in the judgment upon a writ of dower. In Delaware, no view is granted. And in New York it is not of course allowed, but only upon affidavit, for cause.

34. By virtue of the ancient St. of Merton, 20 Hen. 3, in a suit for dower, the widow may have judgment for damages, as well as for the land, but only where the husband died seised.¹ A lease for years, however, will not prevent such recovery, as it does not affect the seisin, but merely the possession. This principle has been adopted by statute in Pennsylvania and Kentucky, (where the St. of Merton seems to be literally copied), and was settled by an early decision, and is now adopted by statute, in New York.²

35. In South Carolina, no damages are recovered. *Interest* is allowed, where the husband died not seised.³

36. In Missouri it is provided, that execution for damages shall run only against the land in which dower is awarded. Also, that if the widow die before judgment, this shall be rendered for damages only.⁴

37. In England, a widow cannot recover her dower without a previous demand for it. It is a good plea by the defendant, that he hath been always ready and yet is, to render dower; because the heir holdeth by title, and doth no wrong till a demand be made, which manifestly distinguishes this case from other actions for recovery of land and damages. And it is said she shall have no damages where, before assignment, she has had the use of the land; as where she has an estate for years.⁵

38. In general, a previous demand is necessary to maintain an action for dower in the United States. Otherwise in New York; and even damages may be recovered without demand. But the plea of "tout temps prist" is a good defence against the claim for damages.

39. A demand for dower may be *by parol*. And an agent may make the demand without any written power of attorney, and elsewhere than on the land.* It should be made upon him who is tenant of the freehold at the time of demand, though he were not such tenant at the death of the husband.⁶

¹ 4 Kent, 64. Co. Lit. 32 b.

² 4 Kent, 64. Embree v. Ellis, 2 John. 119. Purd. Dig. 221. 3 Yeates, 38. 1 Ky. Rev. L. 574. 5 Mon. 283.

³ Heyward v. Cuthbert, 1 M'Cord, 386. Wright v. Jennings, 1 Bai. 277.

⁴ Misso. St. 232-3.

⁵ Co. Lit. 33 a. and n. 3.

⁶ Jackson v. Churchill, 7 Cow. 287. Hitchcock v. Harrington, 6 John. 290. Baker v. Baker, 4 Greenl. 67. Bear v. Snyder, 11 Wend. 592. Leavitt v. Lamprey, 13 Pick. 382.

* It might be otherwise, if an assignment were required *on demand*, instead of a fixed time from demand.

40. In Indiana, if the heirs, &c. reside out of the county where the major part of the lands lie, or any of them are minors without a guardian, a demand is unnecessary. A similar provision in Illinois.¹

41. The St. of Merton, by its terms, seems to compute damages from the husband's death. But by construction, they are estimated only from the demand. This is expressly provided in Maine, New Hampshire and Rhode Island.²

42. In New York and New Jersey, damages against the *heir* are estimated from the husband's death; against any other person, from demand.³

43. The husband is held to have died seised, though he mortgaged the land, and the debt had become due, if no entry or foreclosure had taken place under the mortgage.⁴

44. In New York, if the tenant of the freehold assign during quarantine, no costs shall be recovered in an ejectment for dower. But if, after quarantine, he offer to assign, though before suit brought, costs are allowed.⁵

45. Dower is an important subject of *Equity* jurisdiction; which has become so common a resort for the enforcing of this claim in England, that a distinguished judge remarked, that writs of dower had almost gone out of practice. This jurisdiction was never questioned for all purposes of mere *discovery*. The difficulty of obtaining access to title-deeds in the hands of the heir; of ascertaining the precise lands from which dower is to be assigned, and their relative value; and of procuring a fair assignment of one third of the estate; presents a strong case for the interposition of Chancery, to remove all impediments in the way of the legal title. And although the further power of *relief* was formerly doubted, it is now fully settled that Equity has in all cases concurrent jurisdiction, through commissioners or otherwise, actually to assign dower, unless the title is disputed, and then it sends the case to an issue at law. In Maryland, although the limitation last named was formerly recognised, it seems to be now disclaimed, and the Court of Chancery asserts its full concurrent jurisdiction with other courts, to settle even a disputed legal title.⁶

46. It was remarked by Lord Alvanley, then Master of the Rolls, in a case which has been called "the pole-star of the doctrine," that a dowress stands on the same footing as an infant, in the view of Equity, and that it would be unconscientious to turn her over to law for the recovery of a provision necessary to her immediate sub-

¹ Ind. Rev. L. 209-10. Illin. Rev. L. 238.

² 4 Kent, 64. 1 Smith's L. 169. N. H. L. 88. R. I. L. 189. (See 3 Pick. 479.)

³ 4 Kent, 64. 1 N. J. Rev. C. 397. 1 N. Y. R. S. 742.

⁴ Hitchcock v. Harrington, 6 John. 290. ⁵ Yates v. Paddock, 10 Wend. 528.

⁶ Tothill, 145. Goodenough v. Goodenough, Dickens, 795. 5 John. Cha. 482. 7 Cranch, 370. 1 Story on Equity, 576-7-8. Powell v. Monson, &c. 3 Mas. 347. Wells v. Beall, 2 Gill & J. 463. Steiger v. Hillen, 5 Gill & J. 127.

sistence, when she has been compelled to resort to Equity for discovery.¹

47. In some respects, Chancery gives a relief more perfect than can be obtained at law. Thus, although at law the widow recovers damages from the time of demand, yet if either she or the tenant dies before they are assessed, they are thereby lost.* While Equity, although awarding no damages *as such*, in this case as in all others, will order an account of rents and profits, from the husband's death, if he died seised. In England, by a very recent act, and also in New York, such account is limited to six years previous to commencement of suit. The rents and profits go to the executor, not to the heir, of the widow.²

48. But though, in favor of the widow, the interposition of Chancery may sometimes be peculiarly requisite in cases of dower, yet, in general, Equity follows the law, the parties are to stand on their legal rights, and nothing will be effectual as a bar of dower in Equity which would not be such at law, unless there be fraud and imposition, or some counter Equity against the widow's claim. Thus Equity will not cure any defect in the form of a release of dower.³

49. Whether Chancery will sustain a bill for discovery and relief in favor of a widow against a purchaser of the land for valuable consideration and without notice, is a doubtful point.⁴

50. Generally speaking, in America, fewer cases occur in regard to dower, in which the aid of a Court of Equity is wanted, than in England, from the greater simplicity of our titles, the rareness of family settlements, and the general distribution of property among all the descendants in equal or nearly equal proportions. Such instances however sometimes occur. As where the husband was a tenant in common, and a partition, account or discovery is rendered necessary. So where the lands are held by various purchasers; or the relative values not easily ascertainable, as is the case when they have become the site of large manufacturing establishments; or where the right is affected with numerous or conflicting equities.⁵

51. In New Jersey, although possessing a court with full Chancery powers, dower is considered as exclusively within the cognisance of the common law courts, except for discovery. By a very late statute, however, Chancery jurisdiction upon this subject is extended to the Prerogative and Orphan's Courts.⁶

52. In the United States, suits for dower both at law and in Chancery are comparatively of rare occurrence. The statute law of all

¹ 1 Story, 579. *Curtis v. Curtis*, 2 Bro. Cha. 620-30-34.

² 1 Story, 577. 2 Paige, 377. 4 Kent, 70 & n. 2. *Coons v. Nall*, 4 Litt. (Ky.) 264.

³ *Powell v. Monson, &c.*, 3 Mas. 360.

⁴ 1 Story, 585.

⁵ *Ib.* 587.

⁶ *Harrison v. Eldridge*, 2 Halst. 401-2. 4 Kent, 71 and n.

* It has been seen (p. 92) that this defect in the law has been remedied in some of the States.

the States provides a summary mode for obtaining an assignment of dower, by application or petition to the Prerogative, Probate or Orphan's court, having jurisdiction of the estates of persons deceased.* The assignment is made by commissioners or a special jury, after notice to all parties interested. It has already been stated that this course can in general be resorted to, only where the husband died seised of the land from which dower is claimed, and the widow's right to dower is not disputed by the heirs or devisees.¹

53. In Ohio,² it is said, probably no action for dower will lie, but the only two modes of obtaining it are a voluntary assignment by the heir, &c., and a petition; and the latter is the only method where the land is incumbered.

54. In Vermont and Michigan,³ it is provided that the widow may recover her dower *as the law directs*. Under this clause, an action for dower may undoubtedly be maintained, although in Vermont subsequent provision is made for an assignment by the Probate Court.

55. In New York,⁴ the action of dower is abolished; but the remedy of ejectment is provided for the recovery of dower before assignment. In this suit, commissioners are appointed to make an admeasurement, and possession is given accordingly.

56. In Delaware,⁵ provision is made for an assignment by the Orphan's Court; but the action of dower is also recognised and regulated.

57. In Pennsylvania,⁶ the question recently arose, how far the common law remedy for recovery of dower had been superseded by the statutory provisions for an assignment in the Probate Court. The action was a writ of dower *unde nihil habet*. The husband had been a tenant in common with the defendant. It was contended by the counsel for the latter, that the common law right of dower was abrogated by the statute law, which had created an estate for the widow *in lieu of* dower; and that no remedy therefore would lie for its recovery except that expressly provided. On the other hand it was contended for the plaintiff, that such a construction would impair the right of a trial by jury. The court held, that although the right of the widow was given by statute, yet this was merely declaratory or in affirmance of the common law; that in this case of tenancy in common, the Probate Court would have no jurisdiction; neither could the widow maintain a writ of partition; and therefore the action brought was her only remedy. Judgment for the plaintiff.

58. And probably the remark, made in New York and South Carolina, is equally applicable in most of the other States; that "the acts are made, not to vary the right to dower" (or supersede the old

¹ Mass. Rev. St. 409. 4 Kent, 72.

² Walk. Intro. 326.

³ 1 Vt. L. 132-158. Mich. L. 30.

⁴ 2 N. Y. Rev. St. 303-343.

⁵ Dela. St. 1829, 164, 168.

⁶ Brown v. Adams, 2 Whart. 188.

* In Massachusetts, this mode of assignment, though immemorably practised, is said to have been authorized merely by an *inference* from certain statutes. 9 Mass. 10-1.

remedy), "but to institute a more easy and certain mode of obtaining it."¹*

59. This method of obtaining an assignment of dower partakes of the nature of a suit in different degrees in the several States. The proceeding is usually termed a *petition*, but in Vermont² a *complaint*. It is in fact every where, and in North Carolina and Alabama³ expressly declared to be, in its nature *summary*.

60. In most of the States, the return of the commissioners appointed by the Court to make the assignment, is not made the foundation of a judgment upon which execution issues; but only gives a *right of entry*, or vests a title in the widow, which authorizes her to enter, and which she may maintain, if necessary, by a subsequent suit for possession. Neither are damages ordinarily allowed in this course of proceeding. Its chief object is, to prevent difficulty and contention between the widow and the heir or tenant, as to the just extent or ascertainment of her dower.⁴

61. In New York, the proceedings before the surrogate for admeasurement of dower, are no evidence of *title* in an ejectment, but merely of the *location* of the land; but as to this they are conclusive. But commissioners for assigning dower have the same powers as the sheriff under an execution; and are not confined to a mere assignment by metes and bounds, but may exercise a discretion, and assign dower, for example, in *mines*, and such assignment may be enforced by the surrogate.⁵

62. A record of the assignment of dower in the Court of Probate is presumptive evidence that the assignment was made upon the petition, and with knowledge of the widow, such being the usual course, and the proceeding being for her benefit.⁶

63. But in some parts of this country, particularly the new Western States, a mere petition for dower, which may be called *amicable* at its inception, assumes in its progress the character of an adverse and compulsory suit.

64. In Missouri,⁷ where the widow is deforced of her dower, or cannot have it without a suit, or an assignment is made unfairly, or none is made for twelve months from the husband's death; she may bring a suit, and shall recover damages, from the death of the husband, if he died seised—otherwise from demand. It lies against any one in possession, or claiming an interest, or who deforces her. The suit is

¹ 10 Wend. 528. 1 Bay. 507.

² 1 Ver. L. 158.

³ Alab. L. 259. 1 N. C. Rev. St. 614.

⁴ Williams v. Morgan, 1 Litt. 167. 9 John. 245.

⁵ Jackson v. Dewitt, 6 Cow. 316. Miller v. Hixon, 17 John. 123. Coates v. Cheever, 1 Cow. 460.

⁶ Tilson v. Thomson, 10 Pick. 359.

⁷ Misso. St. 229-30-1-2.

* In Massachusetts, and probably elsewhere, the Probate Court has *exclusive* jurisdiction, only where the provisions of the law on the subject can be enforced by no other tribunal. In other cases, it has merely concurrent jurisdiction, which is taken away by the previous commencement of proceedings in another Court. Stearns v. Stearns, 16 Mass. 171.

in form a petition, and the assignment by commissioners ; but a writ of possession issues. A "writ of dower" however may still be brought.¹ In New Jersey, the right of suing is given in the same words. The time is limited to forty days.²

65. In Vermont, after the return of the commissioners who assign dower, "said dower shall remain fixed and certain," and all parties concerned shall be concluded.³

66. In South Carolina,⁴ the form of application for dower is a *petition* to a common law court, which issues a *writ for admeasurement* to commissioners. They are sworn to "put the widow in full and peaceable possession," and return a plat of the land with their doings, which become matter of record, and are "final and conclusive."⁵

67. In New York,⁶ where an ejectment is provided for the recovery of dower, commissioners are appointed to admeasure dower, and possession is given by them ; but (it seems) no writ of possession issues. After admeasurement, the widow may have ejectment for the specific lands assigned to her.

68. In the same State, it seems, if the land in which dower is claimed was alienated by the husband, such alienation and the value at that time are not subjects of inquiry upon trial of the ejectment, but are to be brought before the commissioners for admeasurement. So, a *settlement* made upon the wife in lieu of dower is not to be inquired into before the surrogate ; but set up as a defence to an action brought for the land which may be assigned to her. Nor have the admeasurers a right to consider any post-nuptial conveyance by the husband to the wife.⁷

69. In Delaware,⁸ in the action of dower, the Court appoint commissioners, whose return is conclusive, and the foundation of a writ of possession and a final judgment for damages.

70. Ordinarily, the assignment of dower is founded on an application made by the widow herself.

71. But in Indiana, Virginia and New York, it may be done on application of the heirs ; in Illinois, of any party interested ; in Missouri, of the heir, legatee, guardian, executor, &c. or a creditor of the widow or her second husband. But in Missouri, there shall be no damages. In New Jersey, the guardian of an heir may apply for admeasurement.* A purchaser of the widow's right cannot claim an assignment, the sale being void ; and though made with the

¹ Misso. St. 231-2.

² 1 N. J. Rev. C. 397.

³ 1 Ver. L. 158.

⁴ Scott v. Scott, 1 Bay, 504. 1 Brev. Dig. 270.

⁵ 2 N. Y. Rev. St. 303, 343. Borst v. Griffin, 9 Wend. 307. Ward v. Kilts, 12, 137.

⁶ Hyde v. Hyde, 4 Wend. 630.

⁷ Dela. St. 1829. 164-5.

* It seems, by an ancient English statute, 13 Ed. I., c. 7, the heir or his guardian might have a writ for admeasurement of dower. See 1 Ky. R. L. 86.

consent of the heir or his guardian, the proceeding is *coram non judice* and void.¹

72. In Tennessee and Ohio, where the heirs of one deceased pray partition, dower shall first be assigned from the whole land. So in Ohio, where land is directed to be sold by administrators.²

73. In Missouri,³ one interested in the estate and not made party to a suit for dower, may after assignment have an action against the widow for *admeasurement* of dower; alleging either that she was not entitled, or an undue assignment. If the latter is proved, the Court shall assign anew, and award a writ of possession.

74. The time, after which the widow is entitled to demand an assignment of dower, is variously established in the different States. In Vermont and Connecticut, sixty days from demand. In New Hampshire, Rhode Island, Maine, Massachusetts, Indiana and Illinois, one month. In Missouri, twelve months from the husband's death. In New York, six months from the time the right accrued.⁴

75. With respect to the time within which a suit for dower must be commenced, by the English law such suit has been held not to be within the ordinary statutes of limitation. The same principle has been adopted in New Hampshire and Kentucky, and, with regard to suits in Equity, in Maryland. But by a very recent English statute (3 & 4 Wm. IV., c. 27) the time is limited to twenty years from the husband's death. In New York, a demand for dower is limited to twenty years from the husband's death, or the removal of certain disabilities. In Kentucky, twenty years are held to be the limitation in Chancery. In Massachusetts, the only statutory limitation is not less than one month, nor more than one year, after demand.⁵

76. In Connecticut, the lapse of time, though connected with other equitable grounds of defence, constitutes no bar to the claim of dower. Fifteen years after the husband's death, his widow claims her dower. In the mean time, a creditor of one of the heirs had taken his share of the land, and the heir was insolvent. Held, she should have her dower without any reference to this incumbrance.⁶

77. A statute of limitation in common form is held inapplicable to dower, upon the ground that such statute contemplates the case of a seisin which once existed, and from the termination of which the statute begins to run. But a widow before assignment is not seised. Neither can the limitation run against her during the life of the hus-

¹ 10 Wend. 419. Ind. Rev. L. 210. Illin. do. 238. Misso. St. 231. Moore v. Waller, 2 Rand. 418. 1 N. J. Rev. C. 399. Shields v. Battz, 5 J. J. Mar. 15. Jackson v. Aspell, 20 John. 411.

² Ten. St. 1823, 46. Walk. Intr. 327.

³ Misso. St. 232.

⁴ 1 Vt. L. 158. N. H. L. 187. R. I. L. 189. Smith's St. 168. 1 Root, 227. Ind. Rev. L. 209. Illin. do. 236. Misso. St. 229. Mass. Rev. St. 616. 2 N. Y. R. S. 303.

⁵ 4 Kent, 69. Barnard v. Edwards, 4 N. H. 107. Wells v. Beall, 2 Gill. & J. 468. Ralls v. Hughes, 1 Dana, 407. 1 N. Y. Rev. St. 742. Mass. Rev. St. 616.

⁶ Crocker v. Fox, 1 Root, 227.

band ; for she had then a merely future and contingent interest, and the allowance of such a limitation would render a conveyance by the husband, made twenty years before his death, a complete bar to her claim.¹ *

78. It has been suggested, that the circumstance of a great lapse of time might be left to the jury as a ground for presuming a release of dower.²

79. A statute of limitation in regard to dower is not applicable to a case where the husband died before the statute went into operation. But, in reference to such a case, it seems the statute runs from the time of its going into operation.³

CHAPTER XII.

ASSIGNMENT OF DOWER. WHAT SHALL BE ASSIGNED, AND BY WHOM; AND THE EFFECT OF ASSIGNMENT.

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| 1. By metes and bounds or otherwise. | 19. Assignment against common right. |
| 3. Practice in the United States. | 21. Assignment of rent, &c. |
| 7. Value of land assigned. | 23. Assignment must be absolute. |
| 9. Assignment in common. | 24. Assignment by parol. |
| 12. Partition by husband. | 27. Assignment by guardian. |
| 13. Assignment by sheriff and commissioners. | 29. Implied warranty. |
| 15. Improper assignment by sheriff. | 30. Entry not necessary. |
| | 31. Assignment has relation. |

1. It is said that dower must be assigned by the sheriff by metes and bounds or in certain closes by name, and that any other assignment is void. But the *heir* may endow the widow generally, of the third part of all the lands whereof the husband was seised. And if the lands were leased, the widow and lessee shall hold in common.⁴

2. And where the nature of the property does not admit of an assignment by metes and bounds, some other is allowed. Thus if the property consist of a mill, the widow shall not be endowed of a separate third part, nor in common with the heir, but of the third toll-dish

¹ *Barnard v. Edwards*, 4 N. H. 107. *Moore v. Frost*, 3 Ib. 126.

² 4 N. H. 109.

³ *Sayre v. Wisner*, 8 Wend. 661.

⁴ Co. Lit. 32 b. and n. 1.

* Such is the reasoning of the Court in New Hampshire. Whether a purchaser from the husband would in such case be regarded as holding under, or adversely to him, *qu.*

or of the whole mill for a certain time. So in case of mines. But from these dower shall be assigned by metes and bounds, if possible.¹

3. This principle of the English law is adopted by the statute law of nearly all the States, and undoubtedly practised upon in all of them.²

4. In Massachusetts, in the case referred to, dower may be assigned in common. In Vermont, New Hampshire and Rhode Island, where no division can be made by metes and bounds, *or the widow cannot be endowed of the premises*, she has one third of the rents and profits.³

5. In Illinois and Missouri,⁴ where the commissioners for assigning dower report that a division will be injurious, a jury shall assess the yearly value, which shall be paid in lieu of dower. In Missouri, on failure of payment execution issues. So for any arrears due at the death of the widow, in favor of her executors. A similar provision exists in South Carolina.⁵ There, it is said, money is assigned not *as*, but *in lieu of* dower. The valuation is either one third of the annual income, or one third of the whole value of the land for seven years. And where the commissioners returned one third of the value of the entire fee, their return was set aside.

6. In New York, where the lands of one deceased are sold by order of court, if the widow will not accept a sum in gross in lieu of dower, one third of the proceeds shall be invested for her benefit. A similar rule has been adopted in New Jersey.⁶ In Maryland,⁷ upon such sale by application of the heirs, the dower land shall be reserved, unless the widow consent to a sale of the whole, she receiving a share of the proceeds, not more than $\frac{1}{2}$ nor less than $\frac{1}{10}$. In Pennsylvania,⁸ where partition of an estate cannot advantageously be made, and the whole is therefore assigned to one or more heirs, the widow shall receive for her dower an annual sum, which shall remain charged upon the land as a rent, to be apportioned among such heirs. If for want of an assignment to one heir the land is sold, the purchaser shall retain one half or one third (according to the circumstances) of the purchase money, which shall be a charge on the land for payment of the interest to the widow.

7. The assignment of dower shall be such as to give not one third of the lands in quantity, but one third of the *income* or rents and profits, according to the quantity and quality of the lands; and such as is best calculated for the convenience of the widow and the heirs,

¹ Coates v. Cheever, 1 Cow. 460.* (See 1 Rand, 258, 344.)

² Illin. Rev. L. 238. Ind. do. 210. Ten. St. 1823, p. 46. Walk. Intr. 327.

³ Mass. Rev. St. 409. 1 Vt. L. 159. N. H. L. 189. R. I. L. 189.

⁴ Illin. Rev. L. 238. Misso. St. 231-3.

⁵ 1 Brev. Dig. 271. 1 Bay, 504. Russell v. Gee, 4 Con. S. C. 254. 2 Ib. 626.

⁶ 2 N. Y. Rev. St. 106. 4 Kent, 45. ⁷ 2 Md. L. 520. ⁸ Purd. Dig. 407-12-15.

* This case (480) contains a form of assignment in mines.

and will least disturb the will, the provisions of which in her favor she renounces.¹

8. In Alabama, Illinois, North Carolina and Kentucky,² the assignment shall include the husband's dwelling-house, or, in Alabama, a portion of it, if it would do injustice to assign the whole. In Kentucky, it makes no difference that she does not herself occupy the mansion.

9. If the widow waives an assignment by metes and bounds; it may be made in common.³

10. This is the only practicable mode, where the husband at his death was a tenant in common with another person.⁴

11. In one case, in Massachusetts, dower was had in $\frac{1}{12}$ of the great sheep pasture in Nantucket.⁵

12. Contrary to the general rule that no act of the husband alone can affect the wife's claim of dower, if partition were made of lands held by him in common during coverture, she shall have dower only in the portion allotted to the husband; upon the grounds, that the husband's co-tenant might have enforced partition by legal process, and that partition being an incident to the estate, the wife's inchoate right of dower was acquired subject thereto. But fraud on the part of the husband, as, for instance, in taking for his share wood-land, not subject to dower, would avoid the partition as to the widow.⁶

13. It is said, that *the sheriff* must assign for dower a third part of each manor; or a third part of the arable, meadow and pasture; but the heir may, with the widow's assent, assign the whole of one manor.⁷ In North Carolina,⁸ a statute provides that the assignment need not embrace one third of each tract. In Indiana,⁹ if the widow elects one tract, it may be assigned to her.

14. But commissioners appointed to assign dower are bound, in general, like the sheriff in whose place they stand, to assign one third part of each parcel of land. If they assign one third of a single tract, creditors of the husband may appear and object; because, if this were allowable, the commissioners might assign wholly from land of which the husband died seised, and the creditors would have no claim against that which he had conveyed in his life-time.¹⁰

15. Where the sheriff assigns dower improperly, the Court will punish him and set aside the assignment.

¹ 1 Ver. 218. *Leonard v. Leonard*, 4 Mass. 533. *Miller v. Miller*, 12, 454. *Conner v. Sheperd*, 15, 167. 1 N. C. Rev. St. 613-4. Illin. do. 237. 4 Kent, 63 n. c. Alab. L. 259. 7 J. J. Mar. 637.

² Alab. L. 259. *White v. Clarke*, 7 Mon. 642. Illin. Rev. L. 237.

³ Co. Lit. 34 b. n. 1.

⁴ 4 Dane, 673. *Rowe v. Power*, 5 B. & P. 1. Co. Lit. 32 b.

⁵ 4 Dane, 674.

⁶ *Potter v. Wheeler*, 13 Mass. 504.

⁷ 1 Cruise, 132. 1 Bay. 504.

⁸ 1 N. C. Rev. St. 614.

⁹ Ind. Rev. L. 210.

¹⁰ *Scott v. Scott*, 1 Bay, 504. *Wood v. Lee*, 5 Mon. 55

16. A sheriff returned that he had assigned for dower in a house, the third part of each chamber, and had chalked it out. Held, an idle and malicious assignment, and the sheriff was committed.¹

17. A sheriff refused to make an equal allotment of dower, and took sixty pounds for serving the writ. He was committed, and an information ordered against him.²

18. A third part of lands containing a coal-work was assigned by the sheriff for dower, without reference to the latter. Upon a bill in equity by the heir to set aside the assignment as fraudulent, and upon his offering one third of both the land and coal-work by way of rent-charge; held, the widow should accept this offer or be endowed anew.³

19. An assignment of one tract, in satisfaction of the widow's claim upon each separate portion of the husband's lands, is termed an assignment *against common right*. The effect of it is, to impose upon her the risk of any defect in the title to the land. If the estate assigned turns out to be more valuable than a third, she may still hold it; and on the contrary, if it proves less valuable, she must bear the loss. The principle is, that she has accepted what could not have been lawfully assigned to her against her will. It is a voluntary release of a legal right for something supposed to be equivalent or more.⁴

20. The whole of one parcel of land was assigned to the widow for life, to be holden in full satisfaction of her dower, and subject to all the conditions and liabilities, and with all the privileges and incidents, of dower. The land assigned proved to be under mortgage, and at the time of assignment the mortgagee was in possession. Held, the widow should not have dower in other land of the husband, held by an innocent purchaser.⁵

21. Lord Coke says, an assignment of lands in which the widow is not dowable, or of a rent issuing out of them, is no bar of dower. Otherwise, with a rent issuing from lands of which she is dowable. Thus, if it is necessary to assign dower in the capital dwelling house, and the widow refuses a single room or chamber in it, she shall have a rent therefrom. The statutory provisions of different States in regard to the assignment of rents and profits, in lieu of the lands themselves, have already been stated.⁶

22. It is said, if the heir assign dower of lands of which the husband was seised, but the widow not dowable, she is tenant in dower. So if she be endowed, and afterwards exchange with the heir for

¹ Abington's case, 1 Cruise, 164. (Cites Palm. 264.)

² Longvill's case, 1 Keb. 743.

³ 1 Pick. 317-8.

⁴ Hoby v. Hoby, 1 Vern. 218.

⁵ Jones v. Brewer, 1 Pick. 314.

⁶ Co. Lit. 34 b. Turney v. Sturges, Dyer, 91. Perkins, 406. Bickley v. Bickley, And. 267. (Supra, p. 100).

other lands, which the husband owned in fee, she shall hold in dower and by the husband.¹

23. The assignment of dower must be *absolute*. Any condition, exception, or reservation annexed to it—as for instance, a reservation of trees—will be void; or the widow, at her election, may sue for her dower anew.²

24. At common law, the heir may assign dower by a mere parol declaration, that the widow shall have certain lands, or, generally, one third of all the lands of which the husband died seised. The Statute of Frauds does not render necessary an assignment in writing. The widow holds her estate by *law*, and not by *contract*.³

25. The same principle seems applicable to an assignment by any other tenant of the freehold. Thus, one of two persons to whom the husband has transferred the land in joint-tenancy, may assign a third part of it, and thereby bind his companion.⁴

26. So the guardian of an infant heir may validly assign dower.⁵*

27. But in Missouri, Kentucky, New Jersey and Virginia,⁶ where the widow sues such guardian for her dower, and he endows her by *favor*, or “makes default, or by collusion defends the plea faintly,” the heirs, on coming of age, may avoid the assignment.

28. In Ohio,⁷ the assignment of dower by the heir or other party interested must be made by deed.

29. In the assignment of dower there is an implied warranty, that the tenant if impleaded may vouch the heir, and if evicted by paramount title from the lands assigned, she shall be endowed anew; except in the case above-mentioned of an endowment *against common right*. But it is said, if the assignment of dower were made by an alienee of the husband, the widow shall not vouch him to be newly endowed, for want of privity.⁸

30. By the assignment of dower, the widow acquires a freehold estate without livery of seisin in England, and probably in this country without entry; because dower is due of common right, and the assignment is an act of equal notoriety.⁹ †

31. After assignment, the law regards the widow, *by relation*, as

¹ Co. Lit. 34 b. n. 9.

² Co. Lit. 34 b. *Wentworth v. Wentworth*, Cro. Eliz. 451.

³ Co. Lit. 35 a. *Baker v. Baker*, 4 Greenl. 67. 1 Pick. 191.

⁴ Co. Lit. 35 a. n. 1. and 2.

⁵ *Jones v. Brewer*, 1 Pick. 314.

⁶ *Misso. St.* 231-2. 1 Ky. Rev. L. 575. 1 N. J. Rev. C. 398. 1 Vir. Rev. C. 171.

⁷ *Walk. Intro.* 326.

⁸ 4 Rep. 122, a. *Mass. Rev. St.* 411. *Scott v. Hancock*, 13 Mass. 168. *Beddingfield's case*, 9 Co. 17 b.

⁹ Co. Lit. 35 a. 4 Dane, 670.

* In England an infant cannot assign dower, *ad ostium ecclesie*. Co. Lit. 34 a.

† Lord Coke remarks, in regard to the legal requisites of an assignment of dower, “here be two things that the law doth delight in, viz. 1. to have this and the like *openly and solemnly done*; 2. to have *certainly*, which is the mother of quiet and repose.” Co. Lit. 34 b.

having had possession from the death of the husband. She acquires no *new freehold*, but comes to her dower *in the per*, by her husband, and is *in* in continuation of his estate, while on the other hand the heir is considered never to have been seised of this portion of the land.¹

32. Upon this principle, where a disseisor dies, although the disseisee cannot enter upon the heir, yet, if dower be assigned in the land, he may enter upon this portion of it; because the widow claims under the husband and not under the heir.² So the widow after assignment becomes entitled to the back rents.³

33. The principle of the common law above-stated, so far as it avoids the seisin of the heir in regard to the lands of which the widow is endowed, can hardly be regarded as in force in the United States.⁴ Indeed, the English law itself seems to be confused and contradictory upon this subject; for while the assignment of dower is said to defeat the seisin of the heir, it is also laid down that such assignment constitutes a species of *subinfeudation*, and the widow holds as a tenant to the heir.⁵ But whatever may be the rule of law in England, in the United States the ancient doctrine of seisin has been so far modified, either by express legislation, or by necessary implication therefrom, sanctioned by usage and adjudication, that for all practical purposes, it seems, the heirs of a husband hold a vested reversionary interest in the lands from which the wife is endowed, subject to conveyance, devise, distribution and legal process. This peculiarity in American law, however, is a subject deserving of careful examination, and will be particularly considered in a subsequent portion of this work.*

34. The widow is regarded as so far holding under the next owner, that like other tenants she is estopped to set up against him a paramount title purchased by her. Nor can a purchaser from her be allowed to do it.⁶ †

¹ 4 Mass. 388.

² 3 J. J. Mar. 48.

³ Park, 344.

⁴ Lit. 393.

⁵ 4 Mas. 467. 5 Pick. 400-1-2.

⁶ Kirk v. Nichols, 2 J. J. Mar. 470.

* A distinction seems to have been made in Massachusetts, between curtesy and dower, as to their effect in defeating the seisin of the heir, in which respect they are alike at common law. The former has been held not to defeat such seisin; while as to the latter, the English rule is said to be in force. (See 4 Mas. 467; 3 Ib. 368, also 1 Sumner, 130.)

† Having now finished the important and somewhat extensive titles of *curtesy* and *dower*, it is worth while briefly to compare these two estates, and designate their several points of similarity and of difference. (See Co. Lit. ss. 2, 52, 53.)

Both are *life-estates* created by *act of law*, and arise out of the same relation, that of marriage. Both require a present seisin, either in law or in deed, in the owner of the inheritance; that is, a title not subject to any particular freehold estate. In both, marriage alone gives an *incipient* or *initiate* title, which the death of the party owning the inheritance is necessary to *consummate*. Both curtesy and dower are a continuation of the deceased party's estate, having the effect to interrupt the seisin as between ancestor and heir, although in the former case the estate is said to be *in the past*, and in the latter *by the husband*. And lastly, neither of these estates is defeated by the ending of the estate out of which it springs, according to the original *limitation*; while both alike are determined by a forfeiture under a *condition*. (Co. Lit. 30 b., n. 7.)

CHAPTER XIII.

JOINTURE.

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| 3. Origin. | 25. Infants. |
| 5. Value. | 26. Waste. |
| 6. When to take effect. | 27. Emblements. |
| 8. Quantity of estate. | 28. Eviction or breach of covenant; and the jointress' lien upon lands. |
| 11. Must be a legal interest. | 38. Favored in Equity. |
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| 13. And so stated. | 43. How barred—by deed. |
| 15. Antenuptial. | 45. By elopement, &c. |
| 16. Provisions not strictly jointures. | 47. By devise, &c. |
| 20. Equitable jointure. | 59. Jointure in the United States. |
| 23. Who may receive a jointure. | |

1. THE next estate for life, and one immediately connected with that of dower, is a *jointure*.

2. A jointure is a competent livelihood of freehold for the wife, of lands or tenements, &c. to take effect presently in possession or profit after the decease of the husband for the life of the wife at least, if she herself be not the cause of its determination or forfeiture.¹

3. This estate originated with the statute of uses. By the common law, as has been stated above, a wife's right to dower attached immediately upon her marriage, and could be defeated only in the few modes which have been mentioned. No conveyance to the wife during coverture would operate as a substitute for her dower, upon the maxim that no right or title to a freehold estate can be barred by a collateral satisfaction; neither was her release, being made during coverture, of any effect. To obviate this inconvenience, it became very common to convey lands to uses, a widow not being dowable of a use; and when a *cestui que use* married, the friends of the woman,

In regard to the points of *distinction* between curtesy and dower, each seems to be in some particulars the more favorably regarded by the law. Tenant by the curtesy does not forfeit his estate, as a wife forfeits her dower, by elopement and adultery. The former may immediately enter upon the land after the death of the wife; while the latter must wait for an assignment or judgment of law. Curtesy embraces the *whole* estate of the wife; while dower is confined to *one third* of the husband's estate. (Co. Lit. 32 b.)

On the other hand, *dower* does not require actual seisin on the part of the husband, as curtesy requires it in the wife. And the wife shall have dower, but the husband shall not have curtesy, without the birth of issue; provided that the issue which she might by possibility have had could inherit the estate.

Co. Lit. 36 b.

by way of provision for her, procured him to take a conveyance from his feoffees, and limit it to himself and the wife for their lives in joint tenancy or *jointure*. When the statute of uses transferred the legal estate to the cestuy, the widow became dowerable, even though the above-named provision had been made for her. Hence this statute provided, that no woman thus provided for should claim dower in the lands of her husband; in other words it made a jointure, if conformable to its provisions, a bar of dower.¹

4. From the definition of a jointure given above, it may be seen that several circumstances are requisite to constitute this estate. These are enumerated at length, and the general principles of law upon this subject fully stated, in *Vernon's case*, already referred to.²

5. With regard to the amount and value of the property limited, although the statute seems to make no express provision upon this point, it must be a reasonable and competent livelihood, taking into view the circumstances of the parties, the amount of the husband's estate, and the portion which he received with the wife.³

6. The jointure must take effect in possession or profit immediately from the husband's death—otherwise it would be less beneficial than dower. Thus if the estate is limited to the husband for life, remainder to A for life, remainder to the wife; this is no bar of dower, it seems, even though A die during the coverture.⁴

7. So, a limitation to the husband in tail, remainder to the wife for life, is not a good jointure, though his issue die before himself, and therefore the widow comes into possession immediately upon his death.⁵

8. The estate limited must be at least as great as for the life of the wife. The estates mentioned in the statute are to the husband and wife and his heirs; or to them and the heirs of their bodies or one of their bodies; or to them for their lives or her life.⁶

9. It is said in an ancient treatise, that an estate to a husband and wife and their heirs is not a good jointure, because not mentioned in the act.⁷ * But it has been since held, that these estates are mentioned only as examples, and do not exclude others equally beneficial and consistent with the intention of the act. Thus, an estate to a man and his wife and the heirs male of their bodies; or to him for life, remainder to her for life, is a good jointure.⁸

10. It was formerly held, that a jointure *durante viduitate* was

¹ *Vernon's case*, 4 Rep. 1. 3 Rep. 59 b. Co. Lit. 36 b. 7 Mass. 155.

² *Supra* 3. 4 Rep. 1. Mass. Rev. St. 410.

³ *M'Cartee v. Teller*, 2 Paige, 511. 4 Dane, 686.

⁴ Co. Lit. 36 b. 4 Rep. 2 a. 7 Mass. 155.

⁵ *Wood v. Shurley*, Cro. Jac. 488. *Caruthers v. Caruthers*, 4 Bro. Rep. 500. 5 Ves. 192.

⁶ 4 Rep. 3 b. 2 a. *Dyer*, 97 a. 248 a. Co. Litt. 36 b.

⁷ Bro. Abr. Dower.

⁸ 4 Rep. 3 b. 2 a.

* Another reason mentioned is, that such estate goes to the heirs generally; but the statute was intended to benefit the issue. *Dyer*, 248 a. n.

good, because it would continue for life, unless terminated by the widow's own act. But it has been decided in New York, that a jointure *during life or widowhood* is bad, unless accepted.¹

11. A jointure, to be good, must be limited to the wife herself, not to another person in trust for her, even though she assent. But equitable jointures are now allowed, and will be noticed hereafter.²

12. A jointure, to be a bar of dower, must be made in satisfaction of the *whole dower*.³

13. It must also appear to have been made to the wife *as a satisfaction* of dower. Before the statute of Frauds, this fact might be *averred*, that is, proved by parol. And it has been suggested that the law is still the same, as there is nothing in that statute excluding averments. But the modern doctrine seems to be otherwise.⁴ Thus, where to a bill in Equity for dower, the heir pleaded that the husband made a bond in trust to secure the wife a certain sum; that it was intended in lieu of dower, and that she acknowledged it to be so: held, parol evidence of such acknowledgment was inadmissible.⁵

14. It is sufficient however if the deed show by strong implication that the provision was intended as a bar of dower. Equity requires a very distinct manifestation of such intent.⁶

15. A jointure, to be binding on the wife, must be made before marriage. If made after marriage, she may refuse it and demand dower.⁷

16. A jointure, made conformably with all these requisitions, is in general absolutely binding upon the wife, and prevents the claim of dower from ever arising. Many provisions made by the husband for the wife, though not in the form above prescribed, may operate as a bar of dower, if accepted by her.⁸ In this respect, a settlement made during the husband's life stands on the same footing with a devise or bequest; which, it has been seen,^{*} if intended as a substitute for dower, the widow can receive only in that way. Indeed, a provision for the wife by will is often in statutes and elsewhere called a jointure, and was originally upheld as a bar of dower, as being within the equity and reason of the Statute of Uses, which establishes jointures.⁹ †

17. Thus, if an estate be settled upon the wife after marriage, and

¹ Mary Vernon's case, 4 Rep. 3. *McCartee v. Teller*, 2 Paige, 511.

² Co. Litt. 36 b. ³ Ib.

⁴ 1 Cruise, 149. Owen, 33. 4 Rep. 3.

⁵ *Tinney v. Tinney*, 3 Atk. 8. (1 Ves. 54. 4 Ves. jr. 391). 9 Mod. 152.

⁶ 4 Hen. & Mun. 23. *Vizard v. Longdale*, 3 Atk. 8. *Ld. Dorchester v. Effingham*, Coop. 323.

⁷ Co. Litt. 36 b. 4 Rep. 3 a.

⁸ 1 Cruise, 151. 4 Rep. 2 a. *Mass. Rev. St.* 410.

⁹ *Vernon's case*, 4 Rep. 4 a. b. 4 Dane, 685.

^{*} *Supra* p. 82.

† A jointure is ordinarily settled *before* marriage; and a devise takes effect *after* it is ended, by death. Hence, they are held to stand on substantially the same ground. 4 Rep. 4 a.

if after the husband's death she accepts it; she is barred of her dower. In New York, such settlement is binding on the wife, unless she dissents, and enters or sues for dower in one year from the husband's death.¹

18. So if the estate limited is less valuable than dower—being burdened with a condition, or made determinable during the life of the wife; still, if she accepts it, she shall not have dower. Thus, where an estate was limited by the husband to the wife for life, upon condition of her performing his will, and after his death she accepted and entered upon the estate; held, inasmuch as the estate was for life, though conditional, and the widow had accepted it, she was barred of her dower.²

19. In some cases, however, if the provision made for the wife has not the legal requisites of a jointure, the widow may claim both such provision and dower also. This is of course the case, where there was no intention to bar dower. And it is said, that where the estate limited is not to commence immediately upon the husband's death, the widow shall have such estate in addition to her dower, although the intermediate party have died before the husband.³ *

20. *In Equity*, any provision which a woman accepts before marriage in satisfaction of dower, as, for instance, a trust estate, or a mere personal covenant of the husband, may constitute a good jointure. Thus, a sum of money secured by bond. So, a bond to the mother of the intended wife, conditioned that the husband or his heirs should settle a certain sum per annum upon her in satisfaction of dower. So even a covenant by the husband that his *heirs, executors or administrators* will pay an annuity for life to the wife, though it be not charged upon lands, is a good jointure. For, although the husband might defeat his own covenant by immediately conveying away all his property, this would be *an eviction*, which would let in the wife to her dower. And although the husband was not in terms bound himself, Equity would treat him as bound, and upon a suit of the wife by her next friend, compel him immediately to settle the annuity.⁴ † —

21. So, where a man and infant woman, each of whom owned leasehold estates, assigned them to trustees in trust to permit the husband to receive the rents for his life, and the wife for hers after his death; held a good jointure.⁵

¹ 1 N. Y. Rev. St. 741. Co. Litt. 36 b. Walk. Intro. 325.

² Vernon's case, 4 Rep. 1. Dyer, 317 a.

³ 4 Rep. 2 a. Co. Litt. 36 b.

⁴ 3 Atk. 8. *Estcourt v. Estcourt*, 1 Cox, 20. 1 Cruise, 152. *Bucks v. Drury*, 3 Bro. Parl. Ca. 492. Cas. Tem. Tal. 80. 9 Mod. 219. 4 Bro. Rep. 506 n. *Jordan v. Savage*, 2 Abr. Eq. 101.

⁵ *Williams v. Chitty*, 3 Ves. jr., 545.

* Such is probably the meaning of the language, "although the wife attains to them, and enters and takes the profits; yet she shall have the dower of the residue." 4 Rep. 2 a.

† Lease for life to A, remainder to his executors for years. The term vests in him, as if it had been to A and his executors. Co. Litt. 54 b.

22. A jointure will be good in Equity, though the estate limited does not proceed immediately from the husband. Thus it may come through trustees, or the demandant in a common recovery, suffered for the purpose of a jointure, or the father of the intended husband, by a conveyance from him to trustees, in pursuance of previous articles.¹

23. All persons, capable of being endowed, are also capable of taking a jointure.²

24. It has been held in England, that a jointure is a *provision*, not a *contract*. Although it is undoubtedly necessary that the woman should have notice of it, yet there is no law requiring that she should be a party to the deed by which the jointure is created. Upon the same principle, it was decided by the twelve judges, three dissenting, that an infant woman is bound and barred of her dower by a jointure made to her before marriage.³*

25. Inasmuch as a legal jointure bars the dower of an infant at law, an equitable jointure will bar it in Equity. But although, in Equity as at law, a jointure not in itself valid may become a bar of dower by the acceptance of the wife, yet in the case of an infant it is otherwise, for an infant has no capacity in law to accept. Hence, a jointure for life or widowhood is bad.⁴

26. In general, a jointress, like other tenants for life, has no right to commit waste. But where there is a covenant that the lands settled shall be of a certain yearly value, and they prove otherwise; she may commit waste to make up the deficiency.⁵

27. A jointure is not, like dower, a continuation of the husband's estate. Therefore a jointress is not entitled to the crops sown at his death.⁶

28. *Eviction* from her jointure restores a woman's right to dower, either entirely, or in proportion to the value of the lands evicted; whether the eviction take place before or after the husband's death, and notwithstanding an acceptance by the widow of the remaining portion of the lands.⁷

29. A jointure was settled before marriage. The husband purchases other lands, alienes them and dies. The widow is evicted from her jointure. Held, she should have dower in these lands, though the husband owned them only while the jointure remained good, and while therefore her dower was barred.⁸

¹ Bridge's case, Moore, 718. Ashton's case, Dyer, 228.

² 1 Cruise, 152.

³ 3 Bro. Parl. Cas. 492. ⁴ 4 Bro. Rep. 506 n. ⁵ 2 Ab. Eq. 101. Earl of Buckingham v. Drury, 2 Eden, 73. ⁶ 4 Kent, 55 n.

⁷ McCartee v. Teller, 2 Paige, 511.

⁸ Finch, 189. 1 Abr. Eq. 221.

⁹ Fisher v. Forbes, 9 Vin. 373.

¹⁰ Gervoye's case, Moore, 717. 7 Mass. 153. Ambler v. Weston, 4 Hen. & Mun. 23. 4 Kent, 55 n.

¹¹ Mansfield's case, Co. Lit. 33 a. n. 8.

* In this case, however, the settlement was made by an indenture of three parts, between the husband, the wife and trustees, executed in the presence of, and witnessed by, her guardian. Four Judges only delivered opinions in the affirmative.

30. Upon the same principle, if a jointure is covenanted or even merely expressed by the husband to be of a certain annual value, and proves of inferior value; Equity will make up the deficiency from his estate. And although the covenant is contained only in articles, not in the settlement itself, the widow will not be at first turned over to law for damages, but Equity will inquire into the amount of the defect, and send it to be tried at law upon a *quantum damnificat*. In such case, the widow, in England, stands as a specialty creditor, and has a claim against the other lands of the husband.¹

31. At law, a mere covenant to settle even certain specific lands, gives no lien upon those lands. In Equity, a covenant to settle lands generally, or lands of a certain value, gives no lien upon the husband's real estate; but the widow stands as a specialty creditor for an amount not exceeding her dower. But a covenant to settle particular lands gives a lien upon them, except as against ignorant purchasers for a consideration. So, if the covenant declare the settlement to be in execution of a power, Equity will ascertain to what lands such power is applicable, and enforce a lien upon them.²

32. No act or neglect on the part of the wife during coverture, will bind her, in case of eviction from the jointure, or of its proving of inferior value to that agreed upon. It is a maxim in law, that the *laches* of a feme covert shall not be imputed to her. A husband, after marriage, gives a voluntary bond to settle a jointure, and afterwards makes such settlement, upon which the bond is given up. After the husband's death the widow was evicted. Held, in Equity, that the giving up of the bond did not bind her, being a feme covert; and that the bond should be satisfied from the personal estate, unless she recovered her dower.³

33. A husband, having a power to settle a jointure, not exceeding £100 per annum, after marriage, appointed lands to trustees for this purpose, covenanting that they were worth £100, and if they were not, that upon demand made during his life, he would make up the deficiency. The husband lived several years, and no complaint was made respecting the jointure. After his death, the widow brings a bill in Equity to have a deficiency made up from the personal estate. Decreed in favor of the widow.⁴

34. If the wife had a title before marriage to the lands assigned her for a jointure, it seems, upon entering on them she is remitted to her former title, and shall recover dower as if evicted.⁵

¹ *Glegg v. Glegg*, 2 Ab. Eq. 27. *Probert v. Morgan*, 1 Atk. 440. *Speake v. Speake*, 1 Ver. 218. *Parker v. Harvey*, 2 Abr. Eq. 241. 1 Cruise, 110.

² 2 Story on Eq. 496, and n.

³ *Beard v. Nuttall*, 1 Vern. 427.

⁴ *Wood v. Shurley*, Cro. Jac. 490.

⁵ *Fothergill v. Fothergill*, 1 Abr. Eq. 222.

35. A widow shall be endowed for life only, though evicted from a jointure in fee.¹

36. In Equity, a jointress is regarded as a purchaser, marriage being held a valuable consideration. Hence, a Court of Equity will always interpose for her protection, and where there is a mere agreement for a jointure, compel an execution of it, which shall *relate* to the time when it ought to have been made.²

37. If the agreement is to settle a jointure before marriage, a marriage without such settlement is no waiver or release of the contract, but the wife, after her husband's death, may enforce it in Equity.³

38. Equity will not relieve against a jointure, although it operates very unequally in favor of the wife.

39. As part of a marriage treaty between A and the father of B, A was to have a marriage portion of £5,000, and settle £500 per annum upon B. The father demanded that the fee of the jointure should be settled upon her in case A died without issue, which A refused. A afterwards resumed the negotiation, received articles for the £5,000, settled the £500 per annum, and mortgaged the reversion of the jointure with his other lands for the payment of £5,000 to his widow, if he should die without issue. In a fortnight afterwards A died, having been feeble and sickly at the time, and having also declared on his death-bed, and in presence of the wife, without contradiction, that no such agreement had been made. The wife brings a bill for foreclosure of the mortgage against the heirs of A, and they bring a bill for relief, alleging fraud. Held, that marriage being a valuable consideration, mere unreasonableness in the provisions of a settlement was insufficient to set it aside—there must be fraud; and that the fairness of the transaction was to be determined by the state of facts at the time, not what took place afterwards. The defendants were decreed to pay the £5,000 without interest.⁴

40. A jointress, being regarded as a purchaser, will be relieved in Equity against a prior voluntary conveyance.⁵

41. Where an heir or other person seeks in Equity to avoid a jointure, for want of title in the husband to make it, and prays a discovery of title-deeds; in order to obtain such discovery, his bill must submit to confirm the jointure, even though made after marriage. And the widow will not be compelled to produce her own deed, unless the party not only offer to confirm but actually confirm the jointure. Upon such confirmation, the Court will order her to deliver up even

¹ 4 Dane, 685.

² 1 Cruise, 156. *Sidney v. Sidney*, 3 P. Wms. 276. *Buchanan v. Buchanan*, 1 Ball. & Beat. 206.

³ *Hayner v. Hayner*, 1 Cruise, 218.

⁴ *Whitfield v. Paylor*, Show. Parl. Ca. 20. (*Wickerly v. Wickerly*, 2 P. Wms. 619.)

⁵ 1 Cruise, 157.

leases, if expired, or attendant on the inheritance, although she may have claims for back-rents and upon the covenants.¹

42. Interest is not allowed upon the arrears of a jointure, except under special circumstances ; as where the widow has been compelled to borrow money on interest. And even this ground is doubted. A *contract* is said to be the only proper reason.²

43. In general, a jointure, like dower, is not liable to be barred or affected by any act of the husband alone. But it may undoubtedly be barred by a joint deed of husband and wife.³

44. It seems, if the jointure were settled before marriage, it being an absolute satisfaction of the right of dower, this right will not be revived by a conveyance of the husband and wife, releasing her jointure. But if made after marriage, inasmuch as the widow might waive it and claim dower, such release will have the effect to restore the wife's right of dower.⁴

45. In England a wife does not lose her jointure, like dower, by elopement and adultery. And in Equity this is no defence to a bill brought by the wife herself, or by trustees for a specific performance of marriage articles for a jointure ; more especially where specific lands are to be settled, and where both the averment and proof are not of positive acts of adultery, but of mere elopement with another man.⁵

46. In New York, Missouri, and New Jersey a jointure, and in New York every other pecuniary provision in heir of dower is barred by elopement and adultery. In Delaware, a jointure is barred by divorce for adultery of the wife, or by adultery and elopement or separation without the husband's fault, unless he be reconciled to her.⁶

47. With regard to the effect of a provision by will, for the benefit of the wife, it has been held in England that such provision being no bar of dower, is upon the same principle no bar of a jointure, which is to be considered as coming in the place of, and having the same privileges with, dower. And where there is a covenant that the jointure lands shall be of a certain value, and they prove deficient, the devise or bequest shall not be taken as a satisfaction of such deficiency, or a performance of the covenant, but as a bounty, and the defect shall be made up as if no devise had been made. It is said, this is not like the case where a husband covenants to settle lands, and lets them descend ; which is held an implied performance. But it is a question of the construction of a will and the intent of a testator. The husband having contracted to make the jointure of a

¹ Towers v. Davys, 1 Vern. 479. Leech v. Trollop, 2 Ves. 662. Lomax v. ———, Sel. Cas. in Cha. 4.

² 2 Ves. 261. Tew v. Winterton, 1 Ves. jun. 451.

³ 1 Cruise, 160.

⁴ Co. Lit. 37 a. Dyer, 358, b.

⁵ Blount v. Winter, 3 P. Wms. 277. Sidney v. Sidney, 3 Ib. 269. 1 Ball & B. 206.

⁶ 1 N. Y. Rev. St. 742. 1 N. J. Rev. C. 400. Misso. St. 229. Dela. St. 1832, 149; 1829, 165.

certain value, this is what the widow has a right to as a purchaser ; it is her own estate, or a debt from her husband to her. Nor does the largeness of the settlement at all vary her rights.¹

48. By marriage articles between an intended husband and the father of his intended wife, the father covenanted to pay a certain sum of money, and to settle lands to certain uses, if the husband would settle lands upon his wife to the value of £500 per annum, as a jointure in lieu of dower. The father fulfilled his covenants, and the husband settled lands, the annual value of which exceeded the amount agreed upon. But afterwards, finding some defect in the title of a part of the lands, and being advised that upon his dying without issue, the jointure might become void in consequence of an entailment, for the benefit of his sisters ; he suffered a fine of the jointure lands, and also in pursuance of a power from his father, appointed other lands to his wife, declaring the same to be in recompense of all deficiencies in her jointure. The husband afterwards made his will, by which he gave the wife a large pecuniary legacy, all his personal estate, several houses and lands, and made her a residuary legatee, all of which provisions were more than double the value of the jointure. Neither the wife nor her father or friends had notice, during the marriage, of the title of the sisters. The husband, by the death of his wife's parents, received a considerable amount of property, and was allowed by her to have the benefit of her estates derived from her father. The will devised to the sisters and their issue the reversion of all the husband's inheritance after the widow's death. After the husband's death, his sisters claimed the lands settled as a jointure, and by legal title evicted the widow therefrom. The widow files a bill in Chancery, to have her jointure confirmed or dower assigned ; and the defendants file a cross-bill for discovery. Held, by Lord Harcourt, that the defendants should convey to the widow lands of her husband to the value of £500 per annum for life, which she should hold in addition to all the other provisions above-mentioned for her benefit. On appeal to the House of Lords, the decree was affirmed.²

49. A man upon his marriage gave bond to a trustee, to settle upon the wife within four months freehold lands worth £100 per annum. After marriage, he devises freehold and copyhold lands, of the annual value of £88, to *his loving wife* and her heirs ; and dies within the four months. Held, this devise was no satisfaction of the jointure, because land cannot be a satisfaction of money, nor the converse ; nor copyhold a satisfaction of freehold. That the phrase *his loving wife* imported a bounty ; and that the wife should take the devise in addition to the £100, if there were assets for payment of bond debts and those charged by will upon the land.³

¹ Probert v. Morgan, 1 Atk. 440. 1 Cruise, 169 a. Prime v. Stebbing, 2 Ves. 409

² Grove v. Hooke, 4 Bro. Parl. Ca. 593. 5 Vin. Abr. 293.

³ Eastwood v. Vinke, 2 P. Wms. 613.

50. More especially is this construction to be adopted, where the husband by his will expressly ratifies and confirms the marriage articles; although in the same sentence he gives to his wife lands for life.¹

51. And the same rule prevails, though the specific lands charged with the jointure are expressly devised away by the will which makes provision for the wife.

52. A man, in consideration of marriage and a large marriage portion, covenanted to convey lands in C to trustees, to raise an annuity for his wife as a jointure and in lieu of dower. The conveyance was not made; but the husband, having sold large estates of greater value than the lands in C, and contracted for the purchase of others, made his will, devising to his wife a leasehold house in London with all the furniture, and also the estates contracted for or the purchase money of those sold, and devising the lands in C to trustees for the benefit of his heir, subject to an annuity. The widow, after entering upon the estates devised to her, brought a bill in Equity against the heir for a specific execution of the marriage articles. Held both in Chancery and in the House of Lords, that the devise was no bar of the jointure.²

53. If a devise is made expressly as a substitute or satisfaction for the jointure of the wife, she cannot hold both, but must make her election between them.

54. A man agreed to purchase lands to the amount of £10,000, and settle them upon his intended wife for her jointure. After the marriage, his father gave him an estate for life, with a power to grant a rent-charge of £400 per annum to any woman whom he should marry, for her jointure. The husband accordingly granted such rent-charge in satisfaction of a part of the jointure; afterwards conveyed a leasehold of £200 per annum in trust for the wife; and then by will confirmed the rent-charge, and the conveyance of the leasehold by way of addition, and in full compensation of the jointure. Held, these provisions were a satisfaction of the jointure, and the widow must elect between them.³

55. It is suggested that in analogy to the law concerning dower, a devise shall be held a satisfaction of the wife's jointure, if the will raises a strong implication that such was the testator's intention. The following case is cited to this point.⁴

56. The father of a husband settled lands upon the wife, and covenanted that they were worth £1000 per annum. After the father's death, the husband, his heir, devised to his wife other lands worth £500, a legacy of £1000, and a part of his household goods. Subsequently, being minded to make some further provision for her,

¹ *Prime v. Stebbing*, 2 Ves. 409.

² *Broughton v. Errington*, 7 Bro. Parl. Ca. 461.

³ *Grandison v. Pitt*, 2 Ab. Eq. 392.

⁴ 1 Cruise, 171.

he revoked the uses of a portion of his estates, and limited them to trustees, to raise £10,000 for her. By a codicil, he devised to her an annuity of £500 for life. The widow brings a bill in Equity to have a deficiency in her jointure made up. Held, the other provisions must be taken as a satisfaction of such deficiency.¹

57. Upon this case however it is remarked, that it was prior to *Prime v. Stebbing*,* and also that it was finally decided upon the ground, that the husband was a very weak man, and under the influence of his wife, and at the execution of the codicil actually insane.

58. In the United States, no very considerable departures have taken place from the English law of jointure; except in a few of the States. Universally, a jointure accepted will operate as a bar of dower; and in many of the States, the statutes providing for the right of dower, in the way of qualification or exception, expressly disallow it in cases where the widow has received a jointure. Vermont seems to be the only State, where a woman of full age "endowed by way of jointure" before marriage may waive her jointure and claim dower.²

59. Mr. Dane remarks, that the colony law of Massachusetts of 1644 supposed the widow might be barred of her dower by a jointure.³

60. In the same State, a jointure which would be good in Equity has been held insufficient to bar dower.

61. By marriage settlement, a husband covenanted that the wife should have an annuity from his estate after his death, and in consideration thereof she covenanted not to claim dower. The husband died insolvent. Held, the covenant for an annuity could not operate as a jointure; nor the covenant of the wife, as a release of her dower or a valid contract—the claim of dower at the time of the covenant not having accrued, and the consideration failing by the husband's insolvency.⁴ Nor could it operate by way of *estoppel*.⁵

62. So where a man and woman before marriage enter into mutual covenants, through a trustee in the nature of a jointure; the former covenanting for an annuity, and the latter agreeing to relinquish all title to dower, and also that her covenant may be pleaded in bar to any claim of dower, with a saving of her right to the annuity: held, the covenants were not extinguished by the marriage, as they could not by possibility be enforced or performed during the marriage; but that a failure to pay the annuity would restore the wife's right to dower in full, although she might perhaps be liable upon the covenant for the difference of value between the two.⁶

¹ *Mountague v. Maxwell*, 4 Bro. Parl. Ca. 598. 2 Ab. Eq. 421.

² *Anth. Shep.* 21.

³ 4 Dane, 685.

⁴ *Hastings v. Dickinson*, 7 Mass. 153.

⁵ 15 Mass. 110.

⁶ *Gibson v. Gibson*, 15 Mass. 106.†

[†] *Supra* s. 50.

† This case is said to be not distinguishable from *Hastings v. Dickinson* (n. 4). But some of the remarks of Wilde J. would seem to imply, that such a covenant, if performed, might bar dower.

63. In South Carolina, the English statute of uses on this subject has been almost in terms re-enacted. In Ohio, it is said the provision must be for the life of the wife.¹

64. In Massachusetts and New York, a woman's assent to her jointure or any pecuniary provision in lieu thereof, must be expressed, if she be of full age, by her becoming a party to the conveyance by which it is settled, or, if she is an infant, by her joining with her father or guardian in such conveyance. In South Carolina, if a jointure be made after marriage, unless by act of parliament, the wife may refuse it and demand dower.²

65. In Massachusetts,³ if a jointure is settled before marriage without the wife's assent, or after marriage with her assent, she is allowed six months after notice of the husband's death, to elect between the jointure and her dower. In Virginia, she is allowed nine months, in Vermont, sixty days; in New York, one year. In Missouri, if a jointure be settled upon an infant or after marriage, the wife may elect.⁴

66. In Missouri,⁵ a jointure may be created by an agreement with the husband or a third person, prior to and in contemplation of marriage, for real or personal estate, to take effect after his death by way of jointure, and expressed to be in bar of dower; or by a conveyance to the husband and wife or a third person and their heirs to the use of them both or of her alone as a jointure. So in New York a jointure may be limited *in trust*.⁶

67. In Delaware, dower will be barred by any estate in or charge on lands, prior to and in contemplation of marriage, for life, to take effect at or before the husband's death, in lieu of dower; provided the wife be of age. In Rhode Island, by a jointure *by deed or will*, for life or in fee, in lieu of dower, to take effect in possession on the husband's death, and forfeitable only like dower.⁷ If made after marriage or to an infant, she may waive it. In Virginia and Kentucky,⁸ the law is substantially the same; except that the jointure may be either *expressly or by averment* in lieu of dower. In Ohio, an infant jointress may waive her jointure.⁹

68. In Missouri, Virginia, South Carolina, Delaware, Massachusetts and Ohio,¹⁰ eviction from a jointure or any part thereof restores the right to dower wholly or *pro tanto*. It is remarked, that

¹ Anth. Shep. 560. Walk. Intr. 325.

² Mass. Rev. St. 410. 1 N. Y. Rev. St. 741. Anth. Shep. 562.

³ Mass. Rev. St. 410

⁴ 1 N. Y. Rev. St. 742. Misso. St. 229.

⁵ Misso. St. 229.

⁶ 1 N. Y. Rev. St. 741.

⁷ Dela. St. 1829, 165. R. I. L. 191.

⁸ 1 Vir. Rev. C. 171. 1 Ky. Rev. L. 575-6.

⁹ Walk. Intr. 325.

¹⁰ 1 Brev. Dig. 268. Walk. Intr. 325. Misso. St. 229. 1 Vir. R. C. 171. 4 Kent, 55 n. Dela. St. 1829, 165. Mass. Rev. St. 411.

this provision is omitted in the Revised Statutes of New York. But, in the absence of any statutory provision, the English rule undoubtedly prevails. (See *supra* s. 28.)

69. In Missouri, Rhode Island, Virginia and Kentucky,¹ if, through any informality in the settlement a jointure fails to bar dower, and the latter is claimed, the widow loses her jointure.

70. In Connecticut,² the rules of the English law relating to jointures have probably been farther relaxed than in any other State. There a jointure may consist of personal estate; and any provision accepted before marriage in lieu of dower will be a good equitable jointure.

71. It was agreed between husband and wife, that his executors should pay her \$100 in lieu of dower from his estate, which was worth \$6000. After his death, the widow gave a receipt acknowledging satisfaction. Held, in Chancery, a good bar of dower.³

72. A man and woman of advanced years, being about to marry each other, entered into a written agreement, by which he promised not to interfere with her property, to support and clothe her, and allow her a part of the avails of her labor. The husband executed his part of the agreement. After his death, his executor delivered to the widow the articles which she had brought to the house. In consideration of the premises, the widow by an unsealed instrument released *the estate* from her claim of dower, but afterwards brought a suit at law to recover it. The heirs file a bill in Chancery for an extinguishment and release. Held, that the contract was one highly beneficial, and the release founded on a valid consideration, and the bill was sustained.⁴

¹ Misso. St. 229. 1 Vir. R. C. 171. 1 Ky. Rev. L. 576. R. I. L. 191.

² Dut. Dig. 53.

³ 8 Conn. 79 n.

⁴ *Andrews v. Andrews*, 8 Conn. 79.

CHAPTER XIV.

ESTATE FOR YEARS.

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| 3. Definition—"term" what
5. How created, and for what time.
6. Must be certain.
9. Executors and trustees.
12. An inferior estate.
13. Tenant not <i>seised</i> .
14. When it commences—entry.
18. In futuro.
22. How terminated.
23. A chattel.
26-36. Limitation of. | 27. Husband and wife.
31-5. Liable for debts.
32. Freehold cannot arise from.
33. Incidents.
34. Estovers.
38. Merger.
43. Surrender.
55. Assignment and underlease.
68. Assignment by reversioner.
75. Conveyance of.
76. Forfeiture. |
|---|--|

1. HAVING treated of freehold estates, I now come to estates less than freehold.

2. Of these, the first in order is an estate for years. This, next to a fee simple, is the most common estate known to the law. It is that to which the term *lease* is chiefly though not exclusively applied.

3. An estate for years, is a right to or a contract for the possession of land for a certain specified time.¹ Both the time and the estate itself are called in law a *term*. Hence the *term* may expire before the time—as, for instance, by a *surrender*.² Thus, if a conveyance be made to A for three years, and after the expiration of the said *term*, to B for six, and A surrenders or forfeits his term after one year; B's estate takes effect immediately. Otherwise, if the language had been after the expiration of *the said time*, or *the said three years*.

4. Lease for years, if the lessee live so long, remainder to A for the residue of *the term*. A shall hold for the whole term after the lessee's death.³

5. This estate is never created like a life estate, by act of law, but always by act of parties. The title is applicable, though the time limited be less than a year.⁴ *

¹ 4 Kent, 85. 1 Cruise, 174. 2 Black. Comm. 112.

² Co. Lit. 45 b.

³ Wright v. Cartwright, 1 Burr. 232.

⁴ Lit. 67. Co. Litt. 54 b.

* A year, in law, consists of three hundred and sixty-five days, the additional day of leap-year not being reckoned; and a half year, of one hundred and eighty-two days. A month, in England, means ordinarily a lunar month, except in mercantile contracts, or where the intention is otherwise. But in this country, a calendar month will be usually intended. In New York, an express statute so provides. So in Massachusetts, in the construction of statutes. Co. Litt. 135 b. Ind. Rev. L. 409. 4 Kent, 95 n. b. 1 N. Y. Rev. St. 606. Mass. Ib. 60.

6. Every estate for years must have a certain beginning and ending, to be ascertained at its creation either by express words, or by reference to some certain collateral act.¹

7. According to the maxim "*id certum est quod certum reddi potest*," a lease for so many years *as A shall name*, is a good estate for years; but a lease for so many years *as A shall live*, or by a parson for so long a time as he shall continue in that office, is bad, as an estate for years. In England, it would be void for want of livery; but in this country would probably create a life-estate.²

8. A conveyance for twenty-one years, if A shall so long live, creates a tenancy for years, because the estate, though it may end sooner, cannot last longer, than the time fixed.

9. A devise to executors, for payment of debts and till the debts are paid, gives them an estate for so many years as will be necessary to raise the required sum. A devise till such time as a certain sum shall be raised from the rents and profits, has the same effect. Lord Coke speaks of the former of these estates as an uncertain interest; being neither for life, for years, nor at will. The uncertainty would make it a life-estate; but this would defeat the object, as the party might die before the debts were paid.

10. Devise to trustees of all the testator's lands in A, in trust to permit the wife to enjoy them for life, afterwards, out of the rents and profits, to pay B an annuity for five years, if he live so long. The will also gives legacies, to be paid when the legatees come of age, and constitutes the wife executrix. Held, the trustees took a chattel interest in the lands in A, either until the legacies were paid, or all the legatees came of age.³

11. A feoffment to the use of A, his executors and assigns, till ten pounds should be levied out of the profits, was held to pass a chattel interest.⁴

12. Tenancy for years is an inferior title to a life estate, however long it may last; being in its nature a chattel interest, according to Lord Coke, "never without suspicion of fraud,"⁵ and not real estate. This inferiority may be traced to the original nature of such tenancy, which grew out of the mere possession of land by the villeins in the early period of the English law.* This naked possession was gradually enlarged into a tenancy at will, yielding rent in kind, and at length into a letting of the land for a certain specified time; but never rose to the dignity of a freehold. Before the Statute of Gloucester, passed in the reign of Edward I., the law, regarding tenants for

¹ 1 Cruise, 174.

² 2 Bl. Com. 115. Co. Litt. 45 b. n. 2.

³ Co. Litt. 42 a. 8 Rep. 96 a. 4 Rep. 81 b. 1 P. Wms. 509. Doe v. Needs, 2 Mees. & Wels. 129.

⁴ Co. Litt. 42 a. n. 7.

⁵ Co. Litt. 46 a.

* In the time of Littleton, the letting of lands to a villein for years operated as an enfranchisement. Litt. 205.

years as rather bailiffs or servants, than as having any estate in the land, allowed their title to be defeated by recovery against the landlord in a real action. This act, and the Statute 21 Henry VIII. allow such tenant to falsify a collusive recovery.¹ These provisions have been re-enacted in New York and North Carolina, and extended to a tenant holding by an execution-title.²

13. Such being the nature of his estate, a tenant for years is not said to be *seised* of the land, but only *possessed* of the term. The subject of seisin has already been considered.*

14. At common law, the mere delivery of a lease does not make the lessee a tenant for years till he enters. But he has an *interesse termini*, which passes to his executors, if he die without taking possession, and may be assigned over.³ Before entry, a lessee cannot maintain trespass.⁴ But, under the Statute of Uses, an estate for years may be created without entry.

15. It is remarked, that there are subtleties upon the subject of an *interesse termini*, that betray excessive refinement and lead to useless abstruseness;⁵ and the rule of American law is stated to be, that the execution and delivery of the lease perfects the title of the lessee to all intents and purposes.⁶ †

16. It seems, if a lessee enter upon the land before the time agreed on, his entry is a disseisin, not a possession under the lease; and although he remain in possession after the time, he is still a disseisor as before by *relation*.⁷

17. But if a lease is limited from a time past, and the lessee was in possession before that time, this shall be intended to have been by permission, and not a disseisin.⁸

18. An estate for years may be created to commence *in futuro*; because such conveyance does not, like a conveyance of the freehold *in futuro*, place the latter *in abeyance*, which is contrary to the policy of the law.‡

19. Where a lease is to commence *in futuro*, if, before entry of the

¹ 1 Cruise, 172. Gilb. Ten. 34.

² 1 N. C. Rev. Stat. 261. 2 N. Y. R. St. 340.

³ Litt. 58, 68, 324. 459. Co. Litt. 200 b. 46 b. 51 b. 270 a. 1 Cruise, 175-6.

⁴ 2 Phil. on Ev. 182.

⁵ 4 Kent, 97 n. a.

⁶ Walk. Intro. 278

⁷ Hennings v. Brabason, 1 Lev. 45.

⁸ Waller v. Campian, Cro. Eliz. 906.

* Supra c. 2, s. 16.

† Littleton says, "when the lessee entereth by force of the lease, then is he tenant for term of years," and the lessor may distrain or have an action of debt for rent. Lord Coke says, "to many purposes he is not tenant for years" till entry; and instances, that his estate cannot be enlarged by a release, although he may release the rent; that the lessor cannot grant away the reversion, *as such*, nor the lessee make a valid *surrender*. But a release will operate to extinguish the rent, whether made before or after the commencement of the term. And before entry, there may be a surrender *in law*, as by taking a new lease. Co. Litt. 338 a.

‡ See ch. II. sec. 48.

lessee a stranger enter by wrong, the former may still make a valid assignment of his term; because, before entry, the estate, not being vested, cannot be divested or turned to a mere right, by any wrongful act; but when the lawful time of entry arrives, the lessee or his assignee enters by a title paramount to all intermediate claims.¹

20. So if after commencement of the term the lessor continue in possession, the lessee may still make a valid assignment.²

21. But where a lessee *in futuro*, having entered, is turned out of possession, he can no longer make a valid assignment; having merely a right of entry left him, which is not assignable.³

22. A freehold estate, in the language of Lord Coke, cannot begin nor end without ceremony. Hence such estate can in general be terminated, before its natural expiration, only by some similar act to that with which it commenced, such as entry. But a lease for years may begin without ceremony, and so may end without ceremony. Hence it may be made to cease by a proviso in the instrument itself. Thus a trust-term will cease, upon fulfilment of the trusts for which it was created, if the instrument creating it so provide.⁴

23. An estate for years is denominated a *chattel real*. Being an interest in land, it has the quality of *immobility*, which constitutes it real; but having no indeterminate duration, it is not ranked with inheritances and other freeholds, but is a mere chattel.* Hence an estate for years, upon the owner's death, passes with personal property to the executor, &c. and not with the real estate to the heir.⁵

24. Upon this principle, the levy of an execution upon a term, in the form of a levy on real estate, in Massachusetts is held void. But in New Hampshire a different rule has been settled.⁶

25. In Massachusetts it is now provided, that a term originally created for a hundred years or more, and of which fifty remain unexpired, shall have all the incidents of a fee simple. And in Ohio, lands, held by permanent leases, are treated as real estate in regard to judgments and executions. But a term for ninety-nine years is to be sold on execution as a chattel.⁷

26. The legal succession to a term cannot be controlled by any limitation in the conveyance.† Hence, if a lease be made to a minister, or other sole corporation, and his successors, the estate will still pass, upon his death, to his executor or administrator, who shall hold it, not in *autre droit*, but in his own right. The reason of the above rule is, that a chattel can never be *in abeyance*. Hence such estate

¹ 1 Cruise, 176.

² *Wheeler v. Thorogood*, Cro. Eliz. 127. 1 Leon 118.

³ Cro. Eliz. 15. 5 Rep. 124 a.

⁴ Co. Lit. 214 b.

⁵ 1 Cruise, 177.

⁶ *Chapman v. Gray*, 15 Mass. 439. *Adams v. French*, 2 N. H. 387.

⁷ Mass. Rev. St. 411. 2 Chase's St. of Ohio, 1185. *Bisbee v. Hall*, 3 Ohio, 465.

* Though for 999 years, and in consideration of a *sum in gross*. 7 Conn. 335.

† See p. 30, n.

may pass to the successor of a sole, who is merely the head of an aggregate, corporation.¹

27. Where a woman, owning a chattel real, marries, it does not, like personal chattels, vest in the husband absolutely, but *sub modo*. He has the power to dispose of it; but if he does not, either legally or equitably, it reverts on his death to her.²

28. Where the husband, holding a term in right of the wife, leases the land for a shorter period and dies, the wife has the reversion, but the rent goes to his executors. If the husband grant the whole term on condition, and the executors re-enter for a breach, they hold absolutely.³

29. If the husband and wife are ejected from the land, and the former recovers it in a suit brought by himself alone, this vests the term absolutely in him.⁴

30. In England, by the St. of Frauds, if a wife die before her husband, he is entitled to administer upon her estate, and takes her chattels real to his own use. They vest absolutely in him, and upon his death pass to his administrator.⁵ A similar rule generally prevails in the United States.

31. The purchaser of a term from an executor is in no case bound to see to the application of the purchase-money. Because, being personal estate, such term is primarily liable for debts.⁶

32. A freehold cannot be derived out of a term. Thus, a rent-charge for life, proceeding from an estate for years, is itself a chattel.⁷*

33. The incidents of an estate for years are in some respects the same with those of a life-estate; and in other respects different from the latter.

34. Tenant for years is entitled to *estovers*.

35. An estate for years, with other chattels, is primarily subject to the payment of debts, in the hands of an executor or administrator. So also it is liable to be sold on execution. But a judgment is no lien upon it. This point will be further considered hereafter.⁸†

36. By the old law, the gift of a term, like that of any other chattel, for a day or an hour, passed the entire interest. But this rule has been changed, and a term for years may now be limited for any number of lives in being.⁹

¹ Co. Lit. 9 a, 90 a. ² 1 Co. Lit. (Thomas's ed.) 224 n. k. ³ 2 Bl. Com. 431.

⁴ 9 Mod. 43. Co. Lit. 46 b. ⁵ Co. Lit. 46 b. ⁶ Ib.

⁷ Co. Lit. 351 a, n. 1. Harg. Law Tracts, 475. Squibb v. Wynne, 1 P. Wms. 378. Cart v. Reeve, Ib. 382. Whitaker v. Whitaker, 6 John. 112.

⁸ Ewer v. Corbet, 2 P. Wms. 148. ⁹ 1 Cruise, 179.

¹⁰ 1 Cruise, 183, Vredenbergh v. Morris, 1 John. Cas. 223.

¹¹ Dyer, 74, pl. 18, 7 b. n. a.

* In England, an exception to this rule is the case of *tithes*, which may be freehold, though the estates on which they are charged are not. 3 Bl. Com. 104 n.

† See Judgment, Execution.

37. But a term for years is not entailable. The disposition of such term to one and the heirs of his body passes the entire interest; so that the estate continues, though the grantee die without issue.¹

38. In general, where a tenant for years becomes seised of the freehold, the term merges in the freehold, and becomes extinct. So one term merges in another immediately expectant thereon. The same person cannot fill the characters of tenant and immediate reversioner in one estate. "*Nemo potest esse et dominus et tenens.*"²

39. A leases to B, and before the rent becomes due, conveys the reversion to C, and C conveys it to B. The rent is hereby extinguished.³

40. There is no merger, where the two estates are successive, not concurrent; as where a lease is granted to tenant "*pour autre vie,*" to commence at the termination of his estate. Nor where there is any intervening estate, either vested or contingent; or the estate in reversion or remainder is smaller than the preceding estate. Thus, if a lease be made to a man for life, remainder to him for years, he holds both estates, and may grant either of them, distinctly; for a greater estate may uphold a lesser, though not the converse.⁴

41. Where a lessee conveys his whole interest to the reversioner, reserving a rent, no reversion being left in the former, the rent is not incident to a reversion as in ordinary cases, and there is no merger. In this case, a tenant for life leased for her own life to the reversioner.⁵

42. But where one is possessed of a term in his own right, and seised of the freehold in *autre droit*, or the converse, it seems the doctrine of merger does not apply; more especially where one of the estates falls to him by act of law. Thus, if a man having a term marries a woman, who afterwards becomes seised of the freehold by descent; or if one having the freehold is made executor of a tenant for years in the same land; the term does not merge. Lord Coke, however, says, that where a man, having a term for years, takes the feme lessor to wife, the term is extinct. And in the case of *Platt v. Sleaf*, this doctrine was sustained by a dissenting judge, who said to the counsel at the bar, that as clear as it was that they were at the bar, so clear it was that the term was extinct.⁶ Upon this subject, however, the decisions are confused and contradictory, and it is difficult to extract from them any well-defined rule.

43. Thus it is said, that where a wife has the inheritance, and the husband a term in the same land, if issue be born to them by which the husband becomes tenant by the curtesy, the term merges.⁷

¹ Dyer, 7 a, pl. 8. and n. a. 1 Cruise, 184. *Hayter v. Rod*, 1 P. Wms. 360.

² Dyer, 112, pl. 49. 4 Kent, 96.

³ *York v. Jones*, 2 N. H. 454.

⁴ *Doe v. Walker*, 5 Barn. & Cress. 111. 3 Pres. on Conv. 166.

⁵ *M'Murphy v. Minot*, 4 N. H. 251.

⁶ *Platt v. Sleaf*, Cro. Jac. 275.

⁷ Sug. on Ven. 533. 1 Bulstr. 118.

44. So it is said, that a term held by one as executor will merge in the freehold held by him in his own right, so far as he is concerned, and as between his heir and executor, though not in relation to creditors of the estate, who would be thereby deprived of their debts.¹

45. A distinction is also made between the case of a term held by the husband and a freehold by the wife; and that of a freehold in him and a term in her. There shall be a merger in the former case, but none in the latter; upon the ground that marriage, being the free act of the husband, may fairly be allowed to prejudice his rights, but not those of his wife, on whose part the marriage is regarded as the act of law. And it is said, that as merger is the annihilation of one estate in another by the conclusion of law, the law will not allow it to take place to the prejudice of creditors, infants, legatees, husbands, or wives.²

46. Merger is not favored in Equity. At law, the intention of a party is not regarded; but in Equity, if there is any beneficial interest to be protected, or any right or intention to the contrary, the union of the legal and equitable interests—as for instance, those of trustee and cestui que trust—in one person, will not effect a merger. The same rule applies, where the party in whom the two estates unite is under some personal incapacity, such as infancy or insanity, to make an election.³

47. It is remarked by a distinguished writer upon this subject, Mr. Preston, that the learning in relation to it is involved in much intricacy and confusion, and there is difficulty in drawing solid conclusions from cases that are at variance or totally irreconcilable with each other.⁴

48. Analogous to merger, is a *surrender*; the former never takes place, unless there is a legal power to make the latter. Surrender is the yielding up of an estate for life or years, to him that hath the next immediate estate in reversion or remainder. Hence it appears, that while merger is the *act of law*, surrender is the *act of a party*. The former, indeed, as well as the latter, is often the *result* of a party's own act; as where he voluntarily purchases the reversion or remainder; but the result or final operation itself of *drowning* one estate in the other is an act of law: while a surrender has this very extinguishment in the mind of the party making it for its sole object. It is said, that a *relinquishment* by the tenant to the reversioner or remainder-man constitutes a surrender; while a *grant* of it produces a

¹ 1 Rolle Abr. 934, pl. 9. 1 Cruise, 186. 1 Ld. Ray. 520. Sug. 533.

² 1 Cruise, 186. Bac. Abr. Lease, R. 1 Salk. 326. But see Godb. 2. 4 Kent, 101. 3 Pres. on Convey. 273, 265, 294. Donisthorpe v. Porter, 2 Eden Rep. 162.

³ 3 Pres. on Convey. 43-49. Gardner v. Astor, 3 John. Cha. 53. Starr v. Ellis, 6, 393. Freeman v. Paul, 3 Green. 260. Gibson v. Crehore, 3 Pick. 475. James v. Johnson, 6 John. Cha. 417. James v. Morey, 2 Cow. 246.

⁴ 4 Kent, 102.

merger. It is presumed, however, that no such subtle and artificial distinction would be now recognised.¹

49. As the interest of an under-lessee would not *merge* in the reversion of the lessor if acquired by him, so he cannot surrender to the latter, but only to his immediate landlord or his assignee.²

50. Though a surrender is characterized as the act of a party, yet it may be implied in law. Before the statute of Frauds, the cancellation of a lease operated as a surrender; but it is now settled otherwise. It seems to be now settled, though once doubted, that the acceptance of a new lease, or of any estate inconsistent with the old one, is a surrender in law; though the new lease be voidable, if not absolutely void.³

51. It seems that while a surrender, made by the original lessee, has no effect to destroy the estate of his sub-tenant, it at the same time discharges the latter from his covenants and liability for rent. To remedy this evil, a recent English statute provides, that a surrender, made for the purpose of renewal, shall have no effect upon the relation between the first lessee and his tenant, a new lease being made by the landlord. Similar acts have been passed in New York and New Jersey.⁴

52. It has been intimated, that the quitting possession of premises leased, and delivering up the key, may amount to a surrender, where these acts are conformable to a well-known local usage.⁵

53. But an assignment by the lessee, with permission of the lessor, cannot be construed as a surrender, so as to discharge the lessee from his covenants, and from liability for the acts of the assignee.⁶

54. Tenant for years, unless specially restrained, may either assign or underlet;⁷ the former, by transferring all his estate—the latter, by transferring the land for a less portion of time than his whole term, whereby a reversion is left in himself. In the latter case, he has the power of distraining for rent; but not in the former, because he has no reversion. An under-lessee is not liable to the original lessor in an action of covenant, there being no privity between them. But his goods and chattels upon the land are liable to distress for the rent in arrear. An assignee of the lessee is liable to an action of debt by the landlord, or his assignee, upon the ground of privity of estate; while the lessee himself still remains liable upon his covenant by privity of contract. But an assignment alters and transfers, from the original parties, the privity of contract, founded merely upon implication

¹ 3 Pres. 23, 153. Co. Lit. 338 a. 3 Pres. 25.

² 2 Pres. Abs. 7.

³ *Magennis v. McCulloch*, Gilb. Cas. 236. *Livingston v. Potts*, 16 John. 28. *Jackson v. Gardner*, 8 John. 384. *Roe v. York*, 6 E. 86.

⁴ *Barton's case*, Moore, 94. *Webb v. Russell*, 3 T. R. 401. 2 Shep. Touch. (Pres. ten's) 301. St. 4 Geo. 2, c. 28, s. 6. 1 N. Y. Rev. St. 744. 1 N. J. Rev. C. 191-2.

⁵ *Randall v. Rich*, 11 Mass. 496.

⁶ *Jackson v. Brownson*, 7 John. 227.

⁷ 1 Cruise, 174.

of law ; so that the first lessee, after acceptance of rent from the assignee, is not liable to an action of debt, but only of covenant.¹

55. The ordinary distinction between an assignment and an under-lease is, that the former transfers the land for the whole term ; the latter, for only a part of it. But it has been held in Ohio, that a transfer of only a part of the lands, though for the whole term, is an under-lease, and the under-lessee not liable for rent to the lessor. On the other hand, in Kentucky, such transfer is an assignment ; and for subsequent rent the assignee is liable in covenant to the lessor.²

56. On the other hand, the assignment of a lease subjects the assignee to certain implied liabilities to the assignor as to the payment of rent. Thus, if the form of assignment is, "he (the assignee) paying" all past and future rent, and indemnifying the plaintiffs against their covenants, and the assignor is afterwards obliged to pay the rent, he shall recover it from the assignee upon the promise in law arising from his acceptance of the assignment.³

57. It is a principle of the English law, that a lease cannot be validly assigned without writing. Mere delivery of the instrument itself, it seems, passes no title. This provision has been expressly re-enacted in nearly all the States, (a transfer by operation of law only excepted).⁴

58. In New York it has been held, that the assignment of a lease need not be under seal.⁵

59. No consideration is necessary.⁶

60. In Ohio an assignment must be witnessed.⁷

61. The assignor of a term for years is liable to the assignee upon any express covenants contained in the assignment ; but no covenants will be implied between them, against eviction by the lessor, or any one claiming under him.

62. A leases land to B, who afterwards, by a writing upon the lease, doth "grant, bargain, &c. to C the whole of the premises, &c. To have and to hold during the term, he the said C performing all covenants," &c. C is evicted by a person claiming under a mortgage from A, and brings an action of covenant therefor against B. Held, that C had a claim against A upon his covenants in the original lease, which were inherent, and went with the land, and even upon the covenant implied in the words "grant and demise ;" but that the action would not lie against B. It would be otherwise with an under-lessee.⁸

¹ 4 Bibb. 538. 4 Kent, 96. *Holford v. Hatch*, Doug. 183. *Lakeux v. Nash*, Str. 1221. *Howland v. Coffin*, 9 Pick. 52. 14 Mass. 487.

² *Fulton v. Stuart*, 2 Ohio, 216. *Cox v. Fenwick*, 4 Bibb. 538.

³ *Fletcher v. McFarlane*, 12 Mass. 43.

⁴ *Anth. Shep.* 245. *Ind. Rev. L.* 269. *St. of U. S. passim.*

⁵ 7 John. 211.

⁷ *Bisbee v. Hall*, 3 Ohio, 465.

⁶ *Noy*, 86, 90. 4 Dane, 135.

⁸ *Waldo v. Hall*, 14 Mass. 486.

63. In an action of debt, by the assignee of the lessor against the assignee of the lessee, the latter cannot offer parol evidence that the rent exceeds the annual value of the premises.¹

64. A liability to pay rent does not run with the land, so as to bind the assignee upon the covenant; unless there be, 1. some estate or interest leased; 2. a rent reserved, properly so called—that is, not a sum in gross, as a personal debt, but a reservation out of the leasehold estate or interest; 3. a covenant of the lessee to pay such rent.²

65. The assignee of a lease is not liable, it seems, for rent accruing before the assignment; though Woodfall (on Landlord and Tenant) lays down a different doctrine.³

66. An assignment need not always be positively proved, but may be inferred from acts and admissions of the parties.

67. The plaintiff leased land to A in 1802. In 1812, A had ceased to occupy, and the defendant had entered and underlet. Plaintiff brings covenant for rent against the defendant, as the assignee of A; and offers evidence, that in 1810 he, the plaintiff, recovered a judgment against B, for rent of the land, as an assignee of the lease, and also, that in 1812 the defendant, having recovered a judgment against B, extended his execution upon the land, and acknowledged the delivery of seisin. Held, that the former part of this proof seemed sufficient to charge the defendant, as presumptive evidence of assignment; but moreover, that the latter part was admissible, as admissions of the defendant, and the person under whom he claimed. Nor did it change the case, that the defendant levied his execution as upon a fee-simple, since by this levy all B's interest passed.⁴

68. While a lessee may assign his lease, the landlord may also assign the reversion, and thereby render the former liable to pay rent to the assignee. The general principles of law upon this subject are well stated by Mr. Justice Wilde.⁵

69. At common law, the assignment of a reversion was incomplete without the *attornment* of the tenant—a formal process of acknowledging or adopting the transfer. If he refused to attorn, he was not liable to the assignee for the rent. But this principle was found inconvenient, as the tenant might unreasonably refuse to attorn, which was a great clog upon transfers. By St. 4 & 5 Anne, c. 16, assignments of reversions were made valid without attornment; but provision was made, that all payments of rents to the lessor, made before notice to the tenant of the assignment, should be held good.*

¹ Howland v. Coffin, 12 Pick. 125.

² Croade v. Ingraham, 13 Pick. 35.

³ M'Murphy v. Minot, 4 N. H. 256. Woodf. 274. 338.

⁴ Adams v. French, 2 N. H. 386.

⁵ Farley v. Thompson, 15 Mass. 25.

* With this protection, however, the tenant is considered to have attorned at the time of assignment. The notice *relates*. Hence the assignee is entitled to the back rents due at the time of notice. Moss v. Gallamore, Doug. 275. 1 T. R. 384. (See 16 Mass. 4. 15 Mass. 269.)

I have always understood that attornment was never considered necessary under the provincial government. It was a doctrine of the old feudal law, and was not applicable to our tenures. But probably *notice* was required here before the statute of Anne, as a substitute for attornment; or, if it were not so, as the provision of the statute is founded on a principle of universal equity, it must be supposed to have been adopted here, unless the contrary can be shown. On general principles also, we should hold notice necessary in a case like this, (where seven quarterly instalments had accrued). For if the assignee of a reversion will lie by, and suffer the lessee to pay rent to the lessor, as it falls due, he has no ground for complaint, although he may suffer by his neglect.

70. These observations were made, in a case where there was a cross-demand due from the lessor to the lessee, which it was agreed between them should go in payment of the rent. Whether, *after notice* by the assignee, this agreement would be a good defence against him in a suit for the rent, was not distinctly decided or considered; though the remarks above cited would seem to imply that such defence would not be allowed. In South Carolina, by special statute, no payment of rent in advance, for more than twelve months, shall be valid against third persons.¹

71. In New Jersey, Kentucky and Alabama, a statute expressly provides, that no attornment shall be necessary, but that any payment of rent to the lessor, before notice of an assignment, shall be valid against the assignee.² In those States where an execution may be levied upon the rents, the officer may require the tenant to attorn, or, if he refuses, deliver possession to the creditor. This provision is made in Maine. In Vermont, it is extended to perpetual leases in fee, or for so long time as the lessee shall perform his covenants.³

72. In Virginia, an assignee of the reversion is placed in all respects, with regard to his claims upon the lessee and his assigns, upon the footing of the original lessor. A lessee and his assigns, also, have all rights and remedies against an assignee of the reversion, which they would have against the original lessor, excepting a recovery in value upon a warranty. This is substantially a re-enactment of the Statute of Hen. 8. The same has been done in North Carolina, New York,* Kentucky, and Delaware;⁴ and it is said, the provision of the English act is so reasonable and just, that it has doubtless been generally approved and adopted as a part of our American law.⁵

¹ S. C. St. Mar. 1817, p. 36.

² Anth. Shep. 244. 1 Ky. Rev. L. 444. Aik. Dig. 93.

³ 1 Smith, 351. Verm. L. s. 326, 1835, 9-10. Ib. 476.

⁴ 2 Ky. Rev. L. 1109. 1 N. C. Rev. St. 259. 1 N. Y. Rev. St. 747-8. Dela. St. 1823, 370.

⁵ 4 Kent, 119.

* The provision applies to grants *in fee*, reserving rent.

73. In Missouri, attornment to a stranger is void, and shall not affect the possession of the landlord, unless made with his consent, under a judgment or decree, or to a mortgagee after forfeiture. Similar provision is made in Kentucky, New Jersey, New York and Virginia. Where execution has issued upon a *dormant* judgment, the attornment of the tenant is void.¹

74. If a lessor assign the lease itself without the reversion, the assignee acquires no right of action against the lessee upon covenants which run with the land; as, for instance, to pay rent, repair, &c.²

75. If a tenant conveys or devises generally, his whole interest will pass.³

76. Tenant for years, coming under the denomination of a *particular tenant*, forfeits his estate by attempting to convey a greater interest than he has, if freehold. But not by attempting to convey a longer term; for the latter is a mere contract, and has no effect upon the reversioner or remainderman. If a husband forfeits a term held *in jure uxoris*, the forfeiture binds the wife, because he might dispose of it.⁴

CHAPTER XV.

LEASE.

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1. A LEASE, is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other

¹ Misso. St. 377. 1 Ky. Rev. L. 444. 1 N. Y. Rev. St. 744. 1 Vir. Rev. C. 159. *Hoskins v. Helm*. 4 Litt. 311.

² *Allen v. Wooley*, 1 Black. (Ind.) 149.

³ *Jackson v. Van Hosen*, 4 Cow. 335. Co. Lit. 42 a, n. 9.

⁴ See p. 40. Co. Lit. 251 b. 1 Salk. 187. 1 Rolle Abr. 351.

income on the other; or a conveyance of lands, &c. to one for life, for years, or at will, in consideration of a rent or other recompense.¹

2. With regard to the form of a lease, it has been remarked,² that in this country very great ignorance prevails as to the legal effect of the covenants contained therein, owing to the general use of printed forms, or copies from books of forms, or from some old instrument in print.

3. A lease for years must, in general, be in writing, parol leases passing only an estate at will.* Leases are ordinarily sealed, as well as signed; and Mr. Dane suggests, that where, by statute, as is generally the case, leases for more than a certain length of time are required to be recorded, it is to be implied that they must be under seal. But ordinarily no seal is necessary to the validity of a lease.³

4. In Delaware, no lease shall operate for a longer term than one year, unless made by deed. In Virginia and Kentucky, a conveyance for more than five years, in Maryland for more than seven years, is invalid, unless sealed and recorded. Between the parties recording, it seems, is unnecessary. In Connecticut, leases for more than one year are good only against the lessor and his heirs, unless attested by two witnesses, acknowledged and recorded. In Ohio, an unsealed writing is good as a lease after entry and enjoyment. Before, it is only a contract.⁴

5. Leases may be *presumed* from long possession, not otherwise to be explained.⁵

6. The words appropriated to this kind of contract, are "demise, lease, and to farm let;" but any other expression, indicating an intent on the one side to quit, and on the other to take, possession for a given time, is sufficient to constitute a lease.† It is sufficient, if there be express words of present demise, or equivocal words accompanied with others, to show the intention of the parties not to have a future lease.⁶

7. "It is covenanted and agreed between A and B in these words: first, that A doth let said lands for five years, to begin at the M. feast next ensuing; provided, that B should pay A annually during the term £120. Also the said parties do covenant, that a lease shall be made and sealed according to the effect of these articles before the

¹ 4 Cruise, 51.

² Per Parker Ch. J. 16 Mass. 239.

³ 4 Dane, 126. Hunt v. Hazelton, 5 N. H. 216.

⁴ 1 Md. L. 126. Del. St. 1829, 368. Con. St. 350. 1 Ky. Rev. L. 432. 1 Vir. Rev. C. 156. Taylor v. Bailey, Wright, 646.

⁵ 4 Pet. 1.

⁶ Co. Lit. 45 b. Bac. Abr. Lease, K. Tooker v. Squier, 1 Rolle's Abr. 847. Cro. Jac. 91. Hall v. Seabright, 1 Mod. 14. Doe v. Ashburner, 5 T. R. 163.

* See further, Estate at Will.

† On the other hand, the word *let* is a comprehensive term, which does not necessarily pass a mere term for years, but may convey the fee. "A hath *let* to B his legal heirs and representatives—at the rate of \$15 per acre, to be paid by B, or his legal heirs, annually to A, his heirs and assigns." This passes the fee, subject to a ground rent in fee. Krider v. Lafferty, 1 Whart. 303.

next feast of S." Held, the words "doth let," made this a present lease, and that the following expressions of prospective import merely contemplated the making of further assurance.¹

8. By articles between A and B, A covenanted, granted and agreed that B should have *and enjoy* the land for six years, in consideration of which, B covenanted to pay an annual rent to A and *his heirs*. Held a good lease.²

9. A and B agreed with C, that they would, with all convenient speed, grant him a lease of, and they did thereby set and let to him certain land, to hold for 21 years, at a certain rent, payable semi-annually. The lease to contain the usual covenants, and certain special ones, one of which spoke of "this demise." Held, these words, with the words *set and let*, made this a present lease, with an agreement for a more formal one thereafter.³

10. A hath let and by these presents doth demise, &c. unto B for 21 years, to commence after A hath recovered said lands from C. Leases, with powers of distress, and clauses for re-entry, &c. to be drawn and signed at the request of either party, as soon as A recovers, &c. Held, a present lease.⁴

11. A bargained, covenanted and agreed with B by articles, that he would lease to B a farm for six years from April 1, 1807, on condition B should pay \$250 on April 1, each year during the term. B covenanted to pay accordingly. Before April 1, 1807, A sold the farm. Held, without paying \$250, B had a vested estate as lessee, and might maintain ejectment.⁵

12. On the other hand, it has been repeatedly held, that notwithstanding words of present demise, an instrument shall not operate as an actual lease, if there is a manifest intention appearing on the whole paper that it should operate otherwise.

13. A and B entered into the following articles—"A doth demise, &c. to B, to have it for 40 years," with a rent reserved and a clause of distress. A memorandum was afterwards written in the same paper, that these articles were to be ordered by counsel of both parties, according to due form of law: A lease was afterwards drawn by counsel, but not sealed, the parties differing as to fire hote. Held, no lease.⁶

14. A doth hereby agree to let, and B agrees to rent and take, &c. all his estate, &c. It is agreed that said B shall enter immediately, but not commence payment of rent till, &c. It is further agreed that leases, with the usual covenants, shall be made on or before, &c.

¹ Harrington v. Wise, Cro. Eliz. 486.

² Drake v. Munday, Cro. Car. 207. Tisdale v. Essex, Hob. 34.

³ Baxter v. Browne, 2 Black. R. 973.

⁴ Barry v. Nugent, 5 T. R. 165.

⁵ Thornton v. Payne, 5 John. 74.

⁶ Sturgion v. Painter, Noy R. 128. (Pleasants v. Higham, 1 Roll. Abr. 848.)

¹ Held, no lease ; but only an agreement for immediate possession till a lease could be drawn.¹

15. A certain instrument recited that A, if he should have a title to certain land upon B's death, would immediately lease it to C, and declared that he did thereby agree to demise the same, with a subsequent covenant to procure a license, &c. to do it. Held, only a contract for a lease.² *

16. A agreed to let her house to B during her life, supposing it to be occupied by B, or a tenant agreeable to A, and a clause was to be added in the lease, to give A's son an option to possess the house when of age. Held, only a contract, not a lease.³

17. A town, by vote, directs that a lease of certain land may be made, "which shall vest in the lessee all the rights of said town to enter upon said quarries and remove stones, and do any other lawful act for and in behalf of said town, in relation thereto." This vote, and a lease made in pursuance of it, give to the lessee a perfect right of entry and possession, with all the powers of the town in relation to the subject. The lessee becomes a legal owner, and may maintain trespass either against a stranger or the agent of the town. But the mere vote of a town that their agent may let certain land for a year, is no lease, and, if he let without writing, the lessee has only an estate at will.⁴

18. "It is hereby agreed between A and B, that A will let to B the use of the county house in L from Dec. 1817 to April 1818, and B agrees to pay A therefor \$250, provided a majority of the county court agree thereto. Nov. 13, 1817." Held no lease, but an agreement upon condition precedent ; and, in assumpsit by A for the rent, B was allowed to prove by parol that he occupied as tenant of the county.⁵

19. Articles of agreement between A and B contained the following clause—"that the said mills, &c. he shall enjoy, and I engage to give him a lease in for 31 years from, &c. at the rent, &c., and that I will purchase one yard in breadth to be laid to the race, &c. And if it be bought, and the purchase is more than £200 per acre, said B to pay" the additional cost. Held, the words *he shall enjoy*, and *I engage to give him a lease*, showed an unequivocal intention for a future lease ; and this construction was confirmed by the consideration, that A was to obtain other land to be laid to the mill, before the lease should be made. And if B should seek to enforce the instrument as a contract in Chancery, he would not be

¹ Goodtitle v. Way, 1 T. R. 735.

² Doe v. Clare, 2 T. R. 739. (See 10 John. 336. 4 Dane, 132).

³ Doe v. Smith, 6 E. 530.

⁴ Todd v. Hall, 10 Conn. 559-60. Hingham v. Sprague, 15 Pick. 102.

⁵ Buell v. Cook, 4 Conn. 238.

* The two last cases turned in part upon the point, that the proper stamp was wanting.

turned round with the objection that he had already a legal, executed estate, but a lease would be decreed to be made.¹

20. Besides the very frequent question whether an instrument is to be construed as a present lease, or merely as a contract for a future one, the question may arise, whether an occupant of land is a lessee, or merely a servant, of the owner. No formal reservation of rent is necessary to constitute the former relation.

21. The defendants, owning a manufactory and a pond above it, and having purchased of the plaintiff the right to draw off water from the pond through his land, made a written contract with one B, by which B was to run the defendants' mill one year, and manufacture for them at a certain price cotton furnished by them, and to keep the mill in good running order at his own expense, except the main gearing, which was to be repaired by the defendants, if necessary. No rent was to be charged by the defendants, and they were not to be called on for any expense, unless the main gearing should fail or some injury arise to the dam. Six or seven acres of land, where the factory stood, with the factory houses, blacksmith shop, &c. were to be used by B. In an action against the defendants for an injury to the plaintiff, caused by B's letting off the water from the pond so rapidly as to overflow the plaintiff's land, held B was a lessee, not a servant, of the defendants, and therefore they were not liable to this action.²

22. A further question might possibly arise, whether a lessor, who is to receive for rent a certain portion of the profits of the land, does not thereby become a *partner* of the lessee. To guard against this construction, it is provided in North Carolina, that a lessor of property for gold mining purposes shall not be held as a partner, though he is to receive a sum uncertain of the proceeds, or any other consideration which is uncertain, but may be made certain.³

23. A mere contract with the owner of land to raise a crop *upon shares*, does not constitute a lease.⁴

24. A agreed with B to sow and raise on B's land a crop of wheat, B to find the team and one half of the seed, and A to do the labor; the wheat, when harvested, to be put in B's barn, threshed, and divided between them. The wheat, while cut and standing, was attached as A's. Held, A had no lease of the land, and no exclusive interest in the wheat, but it belonged to the parties jointly. But if A agree with B to raise a crop upon B's land, and pay him one third of it *as rent*, this is a lease, and A may have trover against B for taking the crop.*

¹ Doe v. Ashburner, 5 T. R. 163. 4 Kent, 105, and authorities.

² Fiske v. Framingham, &c. 14 Pick. 491.

³ 1 N. C. Rev. St. 426.

⁴ 4 Kent, 95.

⁵ Bishop v. Doty, 1 Verm. 37. Hoskins v. Rhodes, 1 Gill. & J. 268.

* Where a transaction of this kind is a mere contract for *personal services*, which would expire with the death of the party occupying, it is no lease. 3 McCord, 211.

25. In Delaware,¹ any *contract or consent*, pursuant to which a tenant enters into or continues in possession of lands, &c. under an agreement to pay rent, is a *demise*. The term is one year, unless the instrument specify a different term, or the property have been usually let for a shorter time.

26. Where a writing is given as a lease, though not properly executed as such ; (as in Connecticut by sealing, acknowledgment and recording), it may be used as evidence that the defendant occupied with permission of the plaintiff.²

27. Where a lease is made, the general presumption is, that it is beneficial to the lessee and therefore accepted by him. But this benefit is to be judged of, not merely by the terms of the lease, but by all the circumstances of the case. If the lessee has himself a perfect title to the land, and the lessor no title, this is not a beneficial lease, and no acceptance will be presumed.³

28. Every lease must have a certain beginning and ending. If made to commence from an impossible date, as the 30th of February—or from the end of another lease, which does not exist, or is void, or misrecited, it takes effect from delivery ; but if from an uncertain date, as where the month is mentioned but not the year, it is void.⁴

29. As to the legal import of the words “from the date,” “from the day of the date,” &c., it was the old rule, that either expression would make the lease to commence the day after the date. But the modern doctrine is, that there is no general rule on the subject ; that in reckoning from an act or event, the day is to be inclusive or exclusive, according to the reason of the thing and the circumstances of the case ; but ordinarily the day is inclusive, the words being used, not by way of computation, but of passing an interest, and because this construction is most favorable to the lessee.⁵ In several cases, the rule is laid down, that where the computation is from *an act done*, the day is included ; as where it is “from the making hereof,” or “from henceforth.”⁶

30. Where the expression is “from the date,” the rule seems to be, that if a present interest is to commence from the date, the day of the date is included ; but if merely used to fix a terminus from which to compute time, the day is excluded.⁷

31. A lease for 21 years, to commence after the termination of a life, is good ; because the commencement, though at first uncertain, is rendered certain by a subsequent event. So, A may grant to B that when B pays him a certain sum, he shall have and occupy the land

¹ Dela. St. 1829, 363.

² Cornwall v. Hoyt, 7 Conn. 420.

³ Co. Lit. 46 b. and n. 10. 1 Mod. 180.

⁴ 4 Kent, 95 n. b. and authorities.

⁵ Arnold v. U. S., 9 Cranch, 104. Co. Litt. 46 b. n. 8, 9.

⁶ Camp v. Camp, 5 Conn. 291.

⁷ Co. Litt. 46 b.

for twenty-one years; and this is a good lease, to commence on payment of such sum.¹

32. The word "lease" as well as "term,"* seems to be of somewhat equivocal import. Thus, instead of applying to the instrument itself, it may be held to refer to the time for which it was to run.

33. The owner of land, containing a quarry, leases the quarry for ten years, and then conveys the land, "reserving the use of the quarry until the expiration of the lease." By mutual consent the lease was cancelled within the ten years. Held, the reservation still remained in force till the ten years expired.²

34. Where a statute requires registration of "any lease for more than seven years from the making thereof;" a lease to commence *in futuro*, though for a term less than seven years, is within the act, if the time be more than seven years from the making of the lease to the end of the term.³

35. Where a lease is made for different periods, in the alternative—as, for instance, for seven, fourteen, or twenty-one years; although not, as has been contended, void for uncertainty, the legal construction seems to be somewhat doubtful. Thus it has been held, in one case, that the duration of the lease for one or the other of the times named, might be determined either by the lessor or the lessee, after due notice; but in a later case, that the latter alone could exercise his election. By continuing over one period, he extends his tenancy to the next.⁴

36. A lease for one year, so for two or three years, as the parties shall agree, from the first year, is a lease for two years; and after the beginning of every subsequent year, is not determinable till the end of it.⁵

37. A lease may be made to terminate before its natural expiration, by proviso or condition. Of this nature, is the usual condition of re-entry upon non-payment of rent.[†]

38. But such proviso is construed strictly, and its terms must be literally complied with.

39. Lease for twenty-one years, provided that either party, or their heirs or executors, might terminate it at the end of seven or fourteen years, by giving six months notice in writing, under his or their respective hands. The lessor died, having devised the land to three executors, as joint-tenants. Two of them gave notice, as for the whole. Held, this was insufficient, it not appearing that the termination of

¹ Dyer, 124. 3 T. R. 463. 6 Rep. 34 b. Co. Litt. 45 b.

² Farnum v. Platt, 8 Pick. 339. ³ Chapman v. Gray, 15 Mass. 439.

⁴ Ferguson v. Cornish, 2 Burr. 1034. Goodright v. Richardson, 3 T. R. 462. Dann v. Spurrier, 3 B. & P. 399-442.

⁵ Harris v. Evans, 1 Wils. 262. 4 Dane, 133.

* See *supra* p. 118.

† See Rent.

the lease would be a benefit to them ; and that neither a subsequent ratification by the non-signing executor, nor his joining in a suit for the land, was sufficient to bind the lessee.¹

40. By St. 32 Hen. 8, c. 28, tenants in tail are empowered to make leases for life or for years, which will bind their issue, but not the reversioner or remainder-man. A lease conformable to this statute, though made by feoffment and livery, will not operate as a discontinuance.

41. It has been already stated (p. 36), that in several of the United States, tenants in tail are empowered to convey in fee, and thereby bar the entailment. It has been questioned, whether such power involves the right of creating lesser estates. In Delaware alone, it seems, tenant in tail is expressly authorized to convey a fee or any less estate. The English statute is said not to be in force in Massachusetts.²

42. By the same English statute, all leases made for years or for life, by those having an inheritance in right of their wives, or jointly with their wives, of any estate of inheritance made before or after coverture, shall bind the wife ; provided the lease be by indenture in their joint names, sealed by her, and the rent reserved in such manner as to follow the estate itself. And the husband shall have no power over the rent beyond his own life, but by joining the wife in a fine.

43. Where a lease is made not conformably to this statute, the wife, or, if she die before the husband, her heirs, may avoid it.³

44. The statute, so far as it relates to husband and wife, has been substantially re-enacted in North Carolina. It seems to be left doubtful in the statute, whether a lease, to be valid, must be an *indenture*. The wife is privately examined. The act is expressly declared not to apply to a grant of the reversion, or a lease without impeachment of waste, or for more than three lives or twenty-one years.⁴

45. A tenant for life cannot make a lease to continue beyond his own estate. And if A, tenant for the life of B, lease for years to C, and B die before the end of the term ; A may re-enter, though he have since purchased the reversion in fee. So the leases of tenants by the curtesy and tenants in dower become void with their death. Where the tenant for life and the reversioner or remainderman join in leasing ; during the life of the former, it shall be his lease and the confirmation of the latter ; and afterwards, *vice versa*.⁵

46. A guardian in socage, in England, having an interest as well as a power, may lease the ward's land in his own name. But the lease expires upon the ward's coming of age.⁶

¹ Right v. Cuthell, 4 Dane, 133.

² 4 Cruise, 57. Vaughn, 383. Walter v. Jackson, 1 Roll. Abr. 633. 2 Mass. 450. Dela. St. 1829, 197. 4 Dane, 126-7.

³ 4 Cruise, 57.

⁴ 1 N. C. Rev. S. 261.

⁵ Co. Lit. 47 b. 4 Cruise, 62. Co. Lit. 45 a. Treport's case, 6 Rep. 14.

⁶ Bac. Abr. Lease 1, s. 9. (See Roe v. Hodgson, 2 Wils. 129, 135. 2 Rolle's Abr. 41.)

47. In Virginia, a *testamentary* guardian may make a lease, reserving the best annual rent and most beneficial covenants, for any term, ending when the ward shall be of age, or continuing longer at the ward's election. So he may take or make a surrender of an old lease. The committee of an insane person are invested with the same power. In North Carolina, a guardian may lease slaves and land, the latter only in writing, during the minority of the ward, with special provisions as to the preservation of the estate and to guard against waste. In Illinois, a guardian may lease for such time and on such terms as the Court may direct, but not beyond the ward's minority, which in females is eighteen years. In Connecticut, the *conservator* of an idiot cannot lease his land.¹

48. If a guardian lease by parol for a year, and during the year the ward die, his heir cannot recover the rent.^{2*}

49. In Massachusetts, a lease by the father or mother, as guardian by nature, of the child's land, is void; upon the principle, that such guardian is under no bonds for the faithful performance of his trust. In Connecticut and Missouri, the father, as guardian by nature, has control of the child's estate, subject to an account in Connecticut, and also in Missouri, unless the estate is derived from the father. The father's power extends to land which descended *ex parte materna*. In Missouri, a mother has the same authority, where there is no lawful father or where the father is dead.³

50. An executor or administrator may lease lands, in which the deceased owned a term for years; and the rents will be assets.⁴

51. An heir may lease before entry.⁵

52. Joint tenants, parceners and tenants in common may lease their undivided shares, jointly or severally. And where one leases, the lessee has the same rights in relation to the others, which the lessor before had. So one may lease to another—this being a mere contract, by which the latter shall take the whole instead of half the profits.⁶

53. If two tenants in common lease the land, and one of them die, the other cannot maintain an action alone for rent accruing after the death of the former.⁷

54. If there be two parceners, owners of three acres of equal value, and one of them lease his interest, and upon partition only one acre

¹ Anth. Shep. 477. 1 Vir. R. C. 322-235. 1 N. C. Rev. St. 311. Treat v. Peck, 5 Conn. 280. Illin. Rev. L. 455.

² Welles v. Cowles, 4 Conn. 182.

³ May v. Calder, 2 Mass. 55. Foster v. Gorton, 5 Pick. 185. Dut. Dig. 23. Bacon v. Taylor, Kirby, 368. 6 Conn. 494. Misso. St. 293.

⁴ 4 Cruise, 62.

⁵ 4 Dane, 135.

⁶ Ib. 2 Ohio, 293. Keay v. Goodwin, 16 Mass. 4.

⁷ Burne v. Cambridge, 1 M. & Rob. 539. Jurist (Jan. 1818) 413.

* It is said in this case that a guardian has an authority only, not coupled with an interest.

be assigned to the lessor ; the lessee may still have an additional half acre. But if two parceners own two acres, and one of them lease one acre, and upon partition the other is assigned to him, the lease becomes void.¹

55. If an infant lease his lands, the lease, it seems, is not void, although sometimes so held, but only voidable, whether with or without rent ; inasmuch as the infant cannot plead to an action upon it "*non est factum*," but must plead his infancy specially. If such rent is reserved as to make the lease a beneficial one, it is *prima facie* binding ; but may be avoided by the infant when he comes of age, or by his heir if he die in minority.*

56. A lease may become void or be forfeited by various causes. In some points of view, this subject will be considered hereafter.† So far as such consequence follows from some act or neglect of the lessee, it is said to be doubtful whether a lease can be forfeited by a mere neglect of the lessee to perform his contract. A sub-lessee certainly cannot allege such forfeiture, until it has been claimed by the party interested.²

57. Where a lease made by any particular tenant is merely *voidable*, if, after his death, the heir, reversioner or remainderman accept or sue for rent from the lessee, or do any other act, recognising the existence of the lease ; this operates as a confirmation of it. But if it were void, there can be no confirmation.⁴ In order to have the effect above referred to, the act of the party entitled must be done with a knowledge of his title at the time ; or he must have lain by and suffered the tenant to make improvements.⁵

58. Both these principles are illustrated in the case of a lease by tenant in tail, not conformable to St. 32 Hen. 8. If *the issue* receive or sue for the rent or sue for waste, this is a confirmation. But as to *the reversioner or remainderman*, the lease is *void*, and no act of his will make it good.

59. A lease by husband and wife not conformable to the statute is *voidable* merely, and may therefore be confirmed, by the wife, after

¹ Co. Lit. 46 a, and n. 5.

² Bac. Abr. Lease B. Co. Lit. 45 b, n. 1. 3 Burr. 1806.

³ Todd v. Hall, 10 Conn. 559-60.

⁴ Noy's Max. 88.

⁵ Cowp. 482.

* In England, the subject of leases by *ecclesiastical persons* is an important one, and has been regulated by *enabling* and *restraining* statutes, the construction of which has given rise to many nice questions. In the United States, these acts are not in force, and the subject itself is of little importance. I have met with no statutory provisions relating to it. In Vermont, (1 Ver. L. 234) lands appropriated or granted for the use of the ministry or "*social worship of God*," may be leased by the selectmen of the town where they lie. In the same State, *glebe rights*, granted by the Crown to the Church of England, are declared to be public reservations and to have vested in the State ; and they are granted to the towns where they are located, with power to the selectmen to lease them, the rent to be applied in aid of *schools*. (See 16 Pick. 273.)

† See Rent, Condition.

the husband's death. Whether a lease by the husband alone is absolutely void, seems an unsettled point.¹

60. All leases made by tenants for life (unless by virtue of a *power*) become absolutely void by their death. Thus, where such lease was made for twenty-one years, and the remainderman, after the death of tenant for life, allowed the lessee to occupy four or five years, and regularly received rent from him; held, he might still, after notice to quit, maintain ejectment.

61. So where the remainderman, after the death of the tenant for life, sold the land at auction, and both in the conditions of sale and the deed to the purchaser the lease was mentioned, and excepted from the covenant against incumbrances; and the purchaser made a mortgage, in which the same notice was taken of the lease, and the mortgagee received rent from the tenant—still the lease was held void.²

62. Nor will the circumstance of the tenant's laying out money upon the land operate at law as a confirmation, where there seems to have been no intention to confirm the old, or grant a new, lease; but both parties acted under the mistaken belief that the original lease was good.³

63. But where a remainderman receives rent, and allows improvements to be made, knowing the defect in the lease, Chancery will compel him to execute a new lease.

64. A tenant for life leased under a power, but not conformably to it. After his death, an assignee of the lessee erected buildings, and the remainderman received rent for six years. The latter then brings ejectment and recovers the premises; and the tenant prays in Equity, for an injunction against proceedings at law, and that he might be quieted. The defendant, in his answer, did not deny notice. Held, he should execute a new lease.⁴

65. In New York, a lease is avoided by conviction of the tenant of using the premises for a bawdy-house.⁵

66. Where a lease contains the proviso, that if the rent shall not be paid at a certain time, the lease shall be void, and the rent is not paid at that time; a subsequent acceptance of rent, and an acquittance as if it had been paid at the day, will not operate as a confirmation. The proviso is a limitation to determine, and not merely a condition to undo, the estate. Hence, upon non-payment, the land becomes discharged of the contract; the tenant holds neither at will nor at sufferance; and the lessor may re-grant the land without entry. The reason is said to be, because the acceptance of rent cannot make a new lease, and the old one was determined. But the acceptance of rent is a sufficient declaration of the lessor's will to continue the

¹ Doe v. Weller, 7 T. R. 478. Bac. Abr. Lease C. 2 Sann. 180 n. 9. Doug. 52.

² Doe v. Archer, 1 Bos. & P. 531.

³ Doe v. Butcher, Doug. 50.

⁴ Stiles v. Cowper, 3 Atk. 692.

⁵ 2 N. Y. R. 3. 702.

lease, for he is not entitled to the rent but by the lease. It is to be observed, however, that in the case in *Croke* the Queen was the lessor, and the non-payment of the rent was found by office before the second grantee entered.¹ And, where a lessor re-enters for non-payment of rent under a condition for re-entry, acceptance of the instalment due, as well after entry as before, is a waiver of the breach, and the tenant is not a trespasser for entering and gathering vegetables on the land.² *

67. In some other cases, to effect the evident intent of the parties, acceptance of rent will operate as a waiver of the forfeiture. Thus, where the lease contains a proviso, that upon any alienation by the lessee the lessor may re-enter; if, after such alienation, of which the lessor has knowledge, he accepts rent, this shall operate as a waiver; otherwise, if he had no knowledge of it.³

68. A lessee covenants to plant a certain number of trees, and always to keep that number on the land. After a breach, the lessor receives rent. He may still re-enter for any subsequent breach.⁴

69. In some cases, a lease, though avoided in part by a party having a right so to do, will afterwards revive. Thus, where a widow avoids a lease made by the husband during marriage, it shall be in force again after her death.⁵

70. The law always presumes a lease to be beneficial to the lessee. Hence, idiots, infants and married women may be lessees. They may disclaim, upon the removal of their disabilities; but a subsequent occupancy will give validity to the lease.⁶

71. A lease usually contains *covenants* both on the part of the lessor and the lessee.

72. The words "doth agree that the lessee shall hold and occupy" during the term, amount to a general covenant for quiet enjoyment. But it covers only such disturbances as are made by virtue of rights then existing; not those acquired afterwards. Therefore the subsequent location of a town-way over the premises is no breach of the covenant. A covenant against such interference would be not against any existing right or interest, but against a naked possibility.⁷ In such case, moreover, the lessee has no claim upon his covenant, because as *owner* of the land he has a perfect constitutional remedy for the damages caused by appropriating it to the public use. The case in principle is the same as that of a tortious eviction.

¹ Co. Lit. 215 a, and n. 117. 3 Rep. 65 a. *Finch v. Throckmorton*, Cro. Eliz. 221. Poph. 53. *Symson v. Butcher*, Doug. 51. *Gwynn v. Jones*, 2 Gill & J. 183.

² *Coon v. Brickett*, 2 N. H. 163.

³ *Jackson v. Brownson*, 7 John. 234. *Roe v. Harrison*, 2 T. R. 425. *Goodright v. Davids*, Cowp. 803. *Chalker v. Chalker*, 1 Conn. 79.

⁴ *Bleeker v. Smith*, 13 Wend. 530.

⁵ Co. Lit. 46 a.

⁶ 4 Cruise, 67.

⁷ *Ellis v. Welch*, 6 Mass. 246.

* "It is unjust, that a lessor should receive both the penalty and the rent; accept performance of the condition, and retain the forfeiture for non-performance." 2 N. H. 164.

73. A covenant in a lease to pay rent during the term and for such further time as the lessee shall occupy, binds him to pay rent accruing after the expiration of the time stipulated; and a surety for the lessee incurs the same liability.

74. Lease for one year, the lessee paying a certain rent per annum, and at the same rate for any shorter period. The lessee covenants to pay said rent in quarterly payments, and to pay the rent as above stated, and all taxes and duties levied and to be levied thereon, during the term, and for such further time as he shall occupy. On the back of the lease, the defendant guarantied performance of the within covenants, and the lessee by another writing agreed to quit on reasonable notice, if the lessor wished to sell or pull down the house. Held, the covenants bound both the defendant and the lessee so long as the latter occupied, even beyond the year; and that the defendant was liable for several quarters' rent, although not notified at the end of each quarter, having suffered no damage from the want of such notice.¹

75. If a lessee covenant *to repair*, he is bound upon his covenant, although the premises are burned down without his fault. So, where he covenants to keep in repair "saving and excepting the natural decay of the same," and to surrender up at the end of the term in as good condition, &c., reasonable use and wearing thereof excepted.²

76. But if a penalty is annexed to the covenant, inevitable accident will excuse from the former, though not from the latter. As where one covenanted to sustain and repair the banks of a river, under pain of forfeiture of £10. The banks being suddenly destroyed by a great flood, held the party was bound to repair, but not subject to the penalty.³ It is to be observed, however, that this was a case of loss by *act of God*.

77. In New Jersey,⁴ by statute, no action lies against any person, on the ground that a fire began in a house or room occupied by him, if accidental. This does not affect any covenant.

78. With respect to the *renewal* of leases; in case of church leases, or those made by trustees of charities, which are usually renewable for a fine or increased rent, although the lessors are not legally bound to renew, yet the tenant has in Equity a transferable interest in this privilege.⁵ A landlord is not bound to renew the lease, without an express covenant to do it. Covenants for *continual* renewal are not favored, for they tend to create a perpetuity, and have been said to be equivalent to an alienation of the inheritance. Hence in the case of trustees of a charity, they have been held invalid in Chancery. But if explicit, the weight of authority is in favor of their validity. Covenants of renewal run with the land, and bind a grantee of the reversion.⁶

¹ Salisbury v. Hale, 12 Pick. 416.

² Bullock v. Dommitt, 2 Chit. K. B. R. 608. Phillips v. Stevens, 16 Mass. 238.

³ 1 Dyer, 33 a.

⁴ 1 N. J. Rev. C. 210.

⁵ Phyte v. Wardell, 5 Paige, 268.

⁶ 4 Kent 108, and authorities.

79. In Ohio,¹ it is said, *perpetual leases*, renewable forever, are very common; but are mere chattels. So where a lease was made for twelve months, and so from year to year at the pleasure of both parties, with a covenant by the lessee not to assign without permission under seal, and a proviso that the lessor should reimburse money laid out in improvements; held, this passed no freehold.² It would be otherwise, it seems, where, upon a long lease, the landlord covenants to pay for improvements, or, if not, to convey in fee.³

80. Where a lease is made to a person, his heirs and assigns, to continue while he pays the rent, and he covenants for himself and his heirs; on failure to perform the covenants, the lessor may treat the lease as forfeited, but not the lessee.⁴

81. How far a tenant himself may cause the implied renewal of a lease, by holding over after his term, will be more particularly considered hereafter.* In Connecticut it is held, that if a lessee for one year hold over, this is a renewal of the lease (of course at the option of the lessor) for the same term. The same consequence follows, where a sub-tenant occupies; or, having occupied, abandons the possession.⁵

82. It is the general rule—not a technical one, but founded in good faith as well as public policy, and so firmly established, that it has been said, “you may as well attempt to move a mountain,”—that in any action between landlord and tenant, the latter is precluded or *estopped*,† by his lease or occupation, from disputing the title of the former to the land, either by pleading or evidence. It is a consequence, or perhaps more properly a part, of the same rule, that a third person, having a title to the land, paramount to that of the lessor, cannot recover rent of the tenant, until he has actually entered, or made legal claim under his title. An action for rent does not lie in favor of a stranger, for the purpose of trying his title, or by one of two litigating parties claiming the land; this action not depending on the validity of the plaintiff's title, but on a contract between the parties, express or implied. It is said, the only exception to this principle of estoppel, is where it would work a fraud upon the lessor or the Commonwealth. It applies not merely to a tenancy, strictly so called, but to any occupation by permission of another. So it applies, not merely to a lessee himself, but to any one claiming under him, or in continuation of his estate, as a sub-lessee, or the wife of a deceased tenant. So if a man take a lease of *his own land*, he is concluded; though it would be otherwise, if it were a lease merely of the herbage. And if a dis-

¹ Walk. Intro. 278.

² Krause, 2 Whart. 398.

³ Eli v. Beaumont, 5 S. & R. 124.

⁴ Folts v. Huntley, 7 Wend. 210.

⁵ Bacon v. Brown, 9 Conn. 338. (See also 4 McCord, 59.)

* See Sufferance, tenant at.

† An estoppel is a restraint or impediment, imposed by the policy of the law, to preclude a party from averring the truth. 15 Mass. 110.

seisee lease to the disseisor by indenture, he shall not have assize during the lease. So a lessee is estopped, though he were in possession before taking the lease.¹ By disclaiming the landlord's title, a lessee becomes a trespasser.² Nor will he be permitted to show a parol admission by the lessor of an adverse title.³

83. Land of the plaintiff, in the occupation of the defendant as lessee, was levied upon by a creditor of the plaintiff, and the defendant evicted. The defendant afterwards occupied as lessee of the creditor, and then purchased the fee of him. The land was afterwards levied upon by another creditor, the former levy being defective and void. The plaintiff brings an action for the rent accruing between the two levies. Held, as the defendant had occupied either as lessee of the first creditor, or as owner, there was no contract, express or implied, between him and the plaintiff; that the remedy of the latter was against the first creditor, and this action would not lie.⁴

84. A, having leased land, with a building upon it, to B, entered into a negotiation with C for a sale of the land only to him. It was left to referees to settle the price, and A put into their hands a deed, to be delivered to C with the award. A was to remove the building by a certain day. The referees, having awarded a certain price, delivered the deed to C, which was recorded; but A excepted to the award, refused the price, tendered the penalty agreed on, and denied that the deed passed any title. C never notified A to remove the building, but notified B to quit at the time fixed for removing the building, or pay rent to him subsequently. B continued to occupy, and expressly promised to pay rent to A, A indemnifying him against C's claim, and actually paid rent to A for a period subsequent to the award; but paid a subsequent instalment to C, receiving from him an indemnity against A. For the latter rent, A brings an action against B. Held, the above facts furnished no defence to such action.⁵

85. A had agreed to become tenant to C until a certain time, at such rent as the arbitrators should award. In an action for use and occupation by C against A, held, A was not bound by an implied contract to pay rent to C, after the time stipulated; and that the title could not be thus tried.⁶

86. A, holding a lease of certain land, took possession from B of a house which B had erected, before A had a lease, upon adjoining waste land, to which B had no title. A leases the house to C. In an ejectment for the house by A's landlord against C, held, C was estopped to deny the plaintiff's title.⁷

¹ 5 T. R. 4. 2 Camp. 11. 5 Pick. 127. 2 Bin. 468. 14 Mass. 93. 5 Yerg. 217, 379. 4 Bibb. 34. 3 Ohio, 295. 1 Bre. 202. Harp. 70. 5 Watts, 55. 2 Dane, 443. Co. Lit. 47 b, 48 a, and n. 12. 4 Mon. 400.

² Duke v. Harper, 6 Yerg. 280.

³ Allen v. Thayer, 17 Mass. 299.

⁴ Boston v. Binney, 11 Pick. 1.

⁵ Jackson v. Davis, 5 Cow. 123.

⁶ Binney v. Chapman, 5 Pick. 124.

⁷ Doe v. Fuller, 1 Tyr. & G. 17.

87. Inasmuch as a tenant cannot even defend against an action at law by denying the title of the lessor; *a fortiori*, Equity will not aid him in such denial.

88. A took possession of land as the tenant of B. B, the term having expired, demands possession, and brings a process of forcible entry, upon which however A was finally acquitted. B then brought an ejectment against A, who purchased an adverse title of C. A files a bill in Equity for an injunction against the suit. Held, the acquittal of A proved nothing as to the title of the land; that the purchase of an adverse title, or disclaimer of that of the lessor, was a forfeiture, from which the statute of limitation would run; but until the legal time of limitation expired, A could not dispute the landlord's title at law, nor have relief in Equity.¹

89. The principle of estoppel does not apply, where a tenant has in any way ceased to stand in that relation. As where the lease is ended, or he has restored possession, or obtained a decree for the title; or where he disclaims the landlord's title, and holds over; or a judgment in ejectment* has been rendered against him, or he has been evicted, by an adverse claimant.² It is said "by the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines."³ Nor does the principle apply to the case of a defective conveyance in fee,⁴ nor where the estoppel is mutual.⁵

90. A, having been a tenant at will to B, remained in possession of the land fifty-seven years after B's death. Held, the jury might presume that the land had been restored to B's heirs, and an actual ouster of them, and that A had acquired a perfect title.⁶

91. Ejectment by the heirs of a lessor against the lessee. The latter may show in defence that the lessor had only a life estate.⁷

92. The tenant in a real action conveyed the land to A in 1813. A devised it to the demandant. In 1816, A reconveyed to the tenant, and in 1822 leased to the tenant, by an indenture for one year, "all the land, &c. which A held from the tenant by deed dated March 20, 1813, now improved by the tenant." The term having expired, held the tenant was not estopped to claim under the deed of 1816. Also that if he were, the demandant, claiming under A, would

¹ Payton v. Stith, 1 Pet. 486.

² Jackson v. Rowland, 6 Wend. 666. — v. Davis, 5 Cow. 123. Presbyterian, &c. v. Picket, Wright, 57. Avery v. Barnum, 1b. 577. 11 Pick. 8, 12, 561. 1 Mar. 99. 330; 2, 243. Fowler v. Cravens, 3 J. J. Mar. 429. Logan v. Steel, 6 Mon. 105; Maverick v. Gibbs, 3 M'Cord, 211.

³ Co. Litt. 47 b.

⁴ 3 N. H. 204.

⁵ Camp v. Camp, 5 Conn. 291.

⁶ Hughes v. Trustees, &c. 6 Pet. 369.

⁷ Heckart v. McKee, 5 Watts, 385.

* In Illinois, Missouri and New Jersey, where a tenant is sued in ejectment by a stranger, he is required under a penalty to give notice of it to the landlord. Illin. Rev. L. 676. Misso. St. 376. 1 N. J. R. C. 192.

be estopped by the deed of 1816, to say that A in 1822 held under the deed of 1813, and "estoppel against estoppel sets the matter at large."¹

93. A hires land of B, and pays him rent. Afterwards, B having agreed with C to give him a long lease of the land, A pays rent to C. In an action by C against A for another quarter's rent, held, A was not estopped from showing that the above-named agreement had been rescinded, and that he had paid this rent to B.²

94. A surrender of the estate by a lessee to his lessor will not authorize him to deny the title of the latter, unless it be made fairly, and so as to give time to the lessor to take possession. Thus, if immediately after such surrender, the tenant takes a lease from an adverse claimant, this proceeding will avail him nothing.³

95. A lessee is not *estopped* to aver a *mode of payment* of rent, varying from the literal import of the lease, and provided for by an independent parol agreement.

96. Thus, in an action by an assignee of the reversion, though the rent is by the lease to be paid quarterly, the lessee may plead, that before the time when the lease was made he loaned money to the lessor, the interest of which it was agreed should go to pay the rent.⁴

97. In an action for rent by an assignee of the reversion against an assignee of the lease, it appeared that upon the execution of the lease the lessee gave several promissory notes, not proved to be negotiable, equal in amount to the rent reserved, and payable respectively as the rents would fall due, and which were stated in the deed of assignment of the reversion, to be given as collateral security. The notes were transferred with the reversion to the plaintiff. Held, it was a question for the jury, whether the notes were intended by the parties to be in payment of the rent.⁵

98. A contract, by which a tenant is induced to desert his landlord, is corrupt and void; and the person to whom he has attorned cannot maintain an action upon it.⁶

99. The purchaser of a term is bound to surrender it to the lessor, not to the original lessee.⁷*

¹ Carpenter v. Thompson, 3 N. H. 204.

² Brook v. Briggs, 2 Bingham, N. C. 572.

³ Farley v. Thompson, 15 Mass. 18.

⁴ Morgan v. Ballard, 1 Mar. 558.

⁵ Boyer v. Smith, 3 Watts, 449.

⁶ Howland v. Coffin, 9 Pick. 52.

⁷ Bruce v. Halbert, 3 Mon. 65.

* In regard to the *estoppel* of a tenant, the old law seems to have made a distinction between leases *by indenture*, and those *by deed-poll*. Littleton says (s. 58), the lessee may plead that the lessor *had nothing in the tenements* at the time of the lease, "except the lease be made by deed indented;" and Lord Coke, (47 b.) that by a deed-poll the lessee is not estopped, and may even plead *non dimisit*, and give the want of title in evidence. But the distinction seems to be now entirely exploded. The principle of the modern doctrine is, that the lessee is estopped, not so much by an express agreement on his part, as by his acceptance of the lease and occupation of the land. And the case seems analogous to that of rent reserved upon a *feoffment* by deed-poll, which is said to be reserved by the *words of the feoffor*, and not by the *grant of the feoffee*, and binds the latter. (Co. Lit. 143 b.; and see 1 Whart. 350-1).

100. The principle of estoppel may be applied to the lessor as well as the lessee. Thus, if the lessor at the time of leasing has no vested interest in the land, but subsequently acquires such an interest, it passes to the lessee or his assignee from the latter period, by estoppel, or rather that which was before an estoppel is turned into a lease in interest. This rule applies, although the lessor at the time of leasing has a future and contingent interest; as, for instance, where he is an heir apparent, or claims under a contingent remainder or executory devise; but not where any actual interest, however small, passes by the lease. Thus, if A, tenant for the life of B, lease to C for years, and then purchase the reversion in fee, upon the death of B he may still avoid the lease.¹

101. Of the nature of a lease, is a *license* to occupy, use or take the profits of land. This, however, seems to pass no *estate*, but merely to confer a certain *right or privilege*. It is a mere authority to enter upon the lands of another, and do an act or series of acts, without having any interest in the land; founded in personal confidence, not assignable, and valid, though not in writing.²

102. Thus a parol license from A to B to take trees from A's land so long as B pleases, expires upon A's death.³

103. A general parol license to cut and carry away wood growing upon land, if available at all, must be acted on within a reasonable time; and applies only to the wood as it is substantially at the time of giving the license. And what is a reasonable time, the facts being agreed, is a question for the court. Such license does not continue fifteen years, not being acted upon.⁴

104. By an indenture between the town of B and a mill dam corporation, the latter granted to the former a certain proportion of a tract of land covered with water, "excepting the mill creek and such other canals as may be agreed to be kept open for the passage of boats." By a subsequent indenture between the same parties, it was agreed that the town might put a covering over part of the creek or canal, "provided only that no interruption or impediment shall be made or permitted below said covering, to boats on passing through or into said canal." Held, these provisions did not constitute a license to the abutters to navigate the creek.⁵

105. The creek being kept open for boats, held, although there was an implied public license to navigate it, this was not such a perpetual license as could be pleaded as a grant or a dedication to the public; and that no individual could acquire a prescriptive right by the use of it while thus open.

¹ Weale v. Lower, Pollexfen, 54. Helps v. Hereford, 2 Barn. & A. 242. Co. Litt. 48 a. n. 11. Ib. 45 a. 47 b. 4 Kent, 97.

² Mumford v. Whitney, 15 Wend. 380.

³ Putney v. Day, 6 N. H. 430.

⁴ Gilmore v. Wilbur, 12 Pick. 120.

⁵ Baker v. Boston, 12 Pick. 184.

106. Where a parol contract, being for the sale of an interest in land, is void as a contract, it may still operate as a *license*, which will excuse the entry of the purchaser.¹

107. If a transaction between two parties amounts to the grant of a permanent privilege in the land, it will constitute a lease, not a license, though the words might seem to import the latter.*

108. A, in consideration of £5, grants to B the privilege of flowing certain land for twelve years without restriction, and for eighty years in the winter, during one half of the year. This is a lease.²

109. An *executory* is to be distinguished from an *executed* license. The former, where the authorized act has not been done, is revocable; but the latter, where the act has been done, is irrevocable, so far as to exempt the party from any liability to the owner of the land.³

110. Where A conveys to B in fee, parol evidence is admissible to prove an agreement between them, that A might enter to remove certain property, because the transaction constitutes a *license*.⁴

CHAPTER XVI.

RENT.

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| 3. In what payable. | 46. To whom it passes upon the lessor's death. |
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| 11. Kinds of rent. | 57. Re-entry. |
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| 13. Rent-charge. | 63. Assumpsit. |
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| 16. Fee-farm rent. | 68. Restoration of land after forfeiture; attachment for—before due. |
| 17. Seisin of rent. | 69. Suit in Chancery. |
| 18. From what it may issue. | 70. Estates in a rent. |
| 23. On what conveyance reserved. | 86. Not lost by non-user. |
| 24. Several rents reserved by one deed. | |

1. RENT is a periodical return made by any particular tenant of land, either in money or otherwise, in retribution for the land.

¹ Carrington v. Roots, 2 Mees. and W. 248.

² Smith v. Simons, 1 Root, 318.

³ Cheever v. Pearson, 16 Pick. 273.

⁴ Parsons v. Camp, 11 Conn. 525.

* That either construction may sometimes be given, see Yr. Book, 5 Hen. 7 pl. 1. 1 Mod. 15.

2. A rent must be certain, or capable of being made so by either party.¹

3. The old doctrine is, that a rent must issue out of the thing granted, and not be a part of the thing itself. Thus it cannot consist of the annual vesture or herbage, for that should be repugnant to the grant.²

4. Rent is often reserved in a certain portion of the produce.* But the whole property in such produce remains in the lessee, till it is divided and the lessor's share delivered to him. And a creditor of the former may legally seize the whole. So upon his death it passes to his administrator.³

5. The same principle applies, where the lease provides that the lessor shall have a claim upon the produce as security for the rent.

6. A lease provided, that the produce, whether growing or harvested, if deposited upon the land, should be held for the rent and be at the lessor's disposal, who might enter and take it for rent in arrear. Before rent-day, previous instalments having been paid, a creditor of the lessee seized by legal process a quantity of corn raised upon the land. Held, no property had vested in the lessor as against creditors, either by way of sale, mortgage or pledge, for want of delivery and continued possession; and the agreement, giving the lessee an absolute title until the lessor should take possession, was fraudulent against creditors.⁴

7. So where a rent is reserved in money, but the lessor reserves a right to take a portion of the produce at a certain valuation in lieu of money; he acquires no property until he has elected and actually taken the produce; and, upon the lessee's death, the right of election ceases, and the whole existing produce vests in the administrator, leaving the lessor, in case of insolvency, only the rights of a general creditor.⁵

8. In Missouri, Tennessee, Mississippi, Ohio (it seems) and Alabama, a landlord has a lien upon the crop for the rent of a year, which, in Missouri, continues eight months, and in Tennessee three months, after the rent falls due. In Virginia, Kentucky, New Jersey, Delaware, New York, Pennsylvania, Mississippi and Alabama, he has the same lien upon the tenant's goods† on the land. In Delaware, if the rent is payable in produce of a certain kind, the lessor has a lien upon this amount of the crop. And if sold on execu-

¹ 3 Cruise, 186. Co. Lit. 142 a.

² *Ib.*

³ *Stewart v. Doughty*, 9 John. 113. *Dockham v. Parker*, 9 Green. 137.

⁴ *Butterfield v. Baker*, 5 Pick. 522. (See 1 Verm. 37.)

⁵ *Wait, &c.* 7 Pick. 100.

* Chancellor Kent considers this the most judicious mode of reservation in long leases, on account of the fluctuating value of money. He mentions the case of the N. Y. University, whose annual income is limited by law to 40,000 bushels of wheat. 3 Kent, 369.

† Perhaps this term is construed to include the crop also. The word *property* is sometimes used.

tion, the purchaser succeeds to the tenant's liability for rent and good husbandry, and the crop is still liable to distress. In New York, the tenant may discharge the lien by giving a bond, with surety, for the rent. If the landlord claim and receive more rent than is due, he is subject to an action for double damages.¹

9. If, in case of such lien, an officer take the goods of the tenant without satisfying the lessor's claim, the measure of damages in a suit by the latter is not the value of the goods, but the amount of rent—the former exceeding the latter.²

10. In Tennessee, an action lies by the landlord against a purchaser of the crop, but not till he has recovered a judgment against the tenant for the rent. The landlord has a lien even against a sub-lessee, who has paid the original tenant.³*

11. By the English law, there are three kinds of rent, viz. *rent-service*, *rent-charge*, and *rent-seck*. And this division has been recognised in New York, although in that State a statute has done away with all distinctions as to remedies.⁴

12. A *rent-service*, the only one known to the common law, and the one chiefly in use in the United States, is thus defined:⁵ "where a tenant holds his lands by fealty or other services and a certain rent." The name *service* was applied to this rent, because it was a substitute for the feudal services which in early times the tenant paid to his lord. To a *rent-service* the power of distress was inseparably incident.

13. A *rent-charge* is where a rent is granted out of lands by deed. Such rent is not *in itself* subject to distress, but is usually *charged* expressly with this right, and hence derives the name of *rent-charge*. It is said that rent-charges, though of great antiquity, were against the policy of the common law, inasmuch as they were commonly for the benefit of younger children, and rendered the grantor less competent to perform his feudal services, while they did not subject the grantee to such services. Hence a rent-charge is against common right. But where a rent-charge is granted for valuable consideration—as in case of partition between parceners, or in lieu of dower; it is said the owner may distrain of common right.

14. A section of the statute of uses transfers to the *cestui que use* of a rent-charge the legal seisin and possession of such rent.⁶

¹ Ten. St. 1825, c. 21. Misso. St. 377. 5 Watts, 134. Dela. St. 1829, 366-7. 1 N. J. R. C. 187. Aik. Dig. 357. 1 N. Y. R. S. 746. 6 Yerg. 267. 4 Griff. 671, 3, 404. 1 Ky. R. L. 639.

² Crawford v. Jarrett, 2 Leigh, 630.

³ Ballantine v. Greer, 6 Yerg. 267. Rutledge v. Walton, 4 Yerg. 458.

⁴ Cornell v. Lamb, 2 Cow. 652. 3 Kent, 368-9.

⁵ Lit. 213.

⁶ Co. Lit. 143 b. 3 Cruise, 187. Lit. 252. 1 Whart. 352. 2 Cow. 652.

* On the other hand, the tenant may acquire a lien upon the land against the landlord. Thus he shall have such lien, in Kentucky, where he has been compelled to pay taxes upon the land beyond or against his contract. In Maryland and New York, the tenant is allowed to deduct the amount of such taxes from his rent. 2 Ky. Rev. L. 1364. 3 Md. L. 121. 1 N. Y. R. S. 419.

15. A *rent-seck* or barren rent is one for recovery of which by distress, at common law, no power is given either by law or by agreement. It does not differ from a rent-charge, except in this particular. Being connected with the power of distress, a rent-charge is regarded as an interest in or specific portion of the land—bound by a judgment, and subject to execution; while a *rent-seck* has none of these properties.¹

16. A *fee-farm* rent is a perpetual rent reserved on a conveyance in fee simple. It is said, that in England, since the statute of *quia emptores*, a fee-farm rent is impracticable, because a grantor in fee retains no reversion, which is essential to a rent. It seems however that such reservation, accompanied by a power of distress and re-entry on non-payment, might make a good rent-charge, and in the United States, though unusual, it would undoubtedly be legal and valid. In Massachusetts, a rent of this description is sometimes known by the name of *quit-rent** or *rent-charge*, and in New Jersey and New York a *rent-charge*. In Pennsylvania, it is termed a *ground rent*, and is said to be a very common species of inheritable estates. In that State, the St. *quia emptores* is not in force; and a ground rent is therefore, as at common law, a *rent-service*, and not a rent-charge, as in England since the statute. It is said by the Court, in their very learned and elaborate opinion, that before the St. *quia emptores*, a rent-charge could exist, only where one man granted to another and his heirs a yearly sum charged on the land with the right of distress; but this statute made a fee-farm or ground rent a rent-charge, by construing the reservation by the grantor into a promise or grant by the grantee. In New York, this view of the subject is not adopted; but every rent is a rent-charge, where the landlord has no reversionary interest.² In Ohio, such a thing is hardly known as a rent-charge.³

17. *Seisin* of a rent can be had only by a receipt of the whole or a part of it, except in case of a conveyance to uses, which, by the operation of the Statute of Uses, gives a seisin immediately without any receipt.⁴

18. A rent can issue only from corporeal hereditaments, or, as Lord Coke says, an inheritance that is *manurable* or *maynorable*, because these alone are subject to distress; and incorporeal rights, being always granted originally by the crown, are created for particular purposes,

¹ Cornell v. Lamb, 2 Cow. 652. People v. Haskins, 7 Wend. 463.

² Co. Lit. 143 b, n. 5. Adams v. Bucklin, 7 Pick. 121. Farley v. Craig, 6 Halst. 262. 1 Whart. 360. Ingersoll v. Sergeant, 1 Whart. 337. Lit. 217 (and see 5 Call, 364). Cornell v. Lamb, 2 Cow. 652.

³ Walk. 265.

⁴ 3 Cruise, 188.

* It is said (Marshall v. Conrad, 5 Call, 364) that *quit-rents*, in England, were rents reserved to the king or a proprietor, on an absolute grant of *waste land*, for which a price in gross was at first paid, and a merely nominal rent reserved, as a feudal acknowledgment of tenure; and that, inasmuch as no rent of this description can exist in the United States, where a *quit-rent* is spoken of, some different interest must be intended.

foreign from the payment of rent, which would therefore be contrary to the intention of the grant.¹

19. A rent cannot be reserved from a rent. Thus, if one leases lands for life, reserving rent, and then grants this rent, reserving rent; the latter reservation is void.²

20. But rent may be reserved upon a lease of the vesture or herbage of land; because the beasts feeding there may be distrained. So upon a lease of a remainder or reversion; because, when become an estate in possession it will be subject to distress, and it is a *tenement*.³

21. Upon a lease to commence *in futuro*, rent may be reserved immediately; because, when the lessee takes possession, the lessor may distrain for the arrears.⁴

22. The preceding remarks as to the kinds of property from which a rent cannot legally be reserved, are to be received with some qualifications. As a mere matter of *contract*, the reservation of a return or compensation for the use of any kind of real estate is binding, and may be enforced by action. But unless the property is of the description above pointed out, first, there can be no distress; and second, by a grant of the reversion, the rent will not pass, not being incident thereto. It is said, however, that the rent reserved, upon a lease of *tithes* will pass with the reversion. At common law, a reservation of rent upon a lease *for life* of incorporeal property is, for all purposes, void; no action of debt will lie for it. And whether St. 8 Anne 14 applies to this kind of property, seems doubtful.⁵

23. Rent may be reserved upon every conveyance which either passes or enlarges an estate. It is usually reserved upon a lease.⁶

24. Where several lands are let by one conveyance, distinct rents reserved, and a right of re-entry upon the whole for non-payment of the rent of one; the reservations create several tenures, demises, reversions and rents, and an entry upon one parcel for non-payment of the rent of another is illegal and void.⁷

25. And a third person may purchase the reversion of one of the parcels, and maintain ejectment for non-payment of the rent of that parcel.⁸

26. But if the rent be at first reserved *in gross* or entire for the whole of the lands leased, and the rent of each parcel afterwards designated separately—as, for instance, for A, B and C £15, viz. £5 for A, £5 for B, and £5 for C; the latter sums will be regarded

¹ Co. Lit. 47 a; 142 a. Gilb. 20-22.

² 2 Rolle. Abr. 446.

³ Co. Lit. 47 a.

⁴ 2 Rolle Abr. 446.

⁵ Windsor v. Gover, 2 Saun. 302. Co. Lit. 47 a; 1b. n. 3; 44, b, n. 3; 47 a, n. 4.

⁶ Co. Lit. 144 a. Gilb. 22.

⁷ Winter's case, 2 Rolle Abr. 448. Tanfield v. Rogers, Cro. Eliz. 340. Lee v. Arnold, 4 Leon. 27.

⁸ Hill's case, 4 Leon. 187.

as mere valuations, and for non-payment of one the lessor may re-enter upon the whole.¹

27. Upon the same principle, if tenants in common join in making a lease upon condition, as they have several estates, the demise, the condition, and the rent will also be construed as several.²

28. Where a statute provides for a re-entry on the *land*, and a sale of the lessee's right in *such lease*, upon non-payment of rent, the entry must be made upon the whole land, without regard to any sub-leases of a part.³

29. A rent service can be reserved only to the owner of the land, or his legal representatives after his death, or to a party who is *privy* to the lease, as to one of two joint-tenants who join in leasing by indenture; because it is a recompense for the use of the land, and should therefore belong to him from whom the land passes. If the lease is to commence after the death of the lessor, the rent may be legally reserved to his heirs, who will take it not as purchasers but by descent, as incident to the reversion. And hence the lessor may release the rent during his life.⁴

30. In such case, the law is strict in requiring the use of the word *heirs*. Thus, where a father and his son and heir apparent joined in making a lease to commence from the father's death, and reserved the rent to *the son*; held, the reservation was void, and the son had no right to distrain for the rent after the death of the father.⁵ Upon the same principle, at common law, if a reversioner assigned over his estate, the assignee could not avail himself of any covenant or condition in the lease. The law upon this subject has already been considered, in treating of the assignment of estates for years.⁶

31. Where the rent is reserved to no one in particular, it shall be payable to the lessor, during his life, and after his death shall pass with the reversion; and any doubtful word shall be taken in that sense, which will best answer the nature of the contract. Thus, if the lessor is a tenant in special tail, and reserves the rent to himself, his heirs and assigns, the rent, upon his death, shall pass to the heir in tail.⁷

32. Lord Coke says, that if a lessor reserve rent generally without showing to whom it shall go, it shall go to his heirs. But in the sentence immediately preceding he says, that if the rent be reserved to him, and not to him and his heirs, the rent shall determine by his death.⁸

33. How far an express reservation may control the legal disposi-

¹ Knight's case, 5 Rep. 54.

² Moo. 202.

³ Hart v. Johnson, 6 Ohio, 88.

⁴ Lit. 346. Co. Lit. 47 a, 143 b; 214 a, n. 1. Gilb. Rents, 61. 2 Rolle. Abr. 447. 2 Saun. 370.

⁵ Oates v. Frith, Hob. 130.

⁶ Cother v. Merrick, Hard. 89.

⁷ Co. Lit. 47 a.

⁸ See p. 127.

tion of a rent, seems to be somewhat doubtful. It is said, that where the law particularizes the persons, the agreement of parties prevents the construction of law, and, if the reservation is special, and to improper persons, the law follows the words. But yet, a rent reserved to the lessor *and his assigns* will terminate with his death. So if the lessor, being owner of the inheritance, reserves the rent to himself and his executors; or if, having himself only a leasehold, he reserves the rent to his heirs; in either case, the rent will cease at his death, because the representatives, to whom it is limited, having no reversion, cannot take the rent incident thereto, and the other class, to whom it is not limited, cannot take it, for the want of such limitation. But if, upon a lease made by the owner in fee, the rent is reserved to himself, his executors, administrators, and assigns, yearly, *during the term*; inasmuch as the latter clause indicates a clear intent, that the rent should not cease with his death, it will pass with the reversion to his heirs, or to a devisee.¹

34. Where the owner of a freehold estate, as for instance a tenant *pour autre vie*, to him and his heirs, assigns his whole estate, leaving no reversion in himself, and reserves a rent to himself, his executors, administrators and assigns, which the lessee covenants to pay accordingly; the rent, upon the lessor's death, will pass to his personal representatives, notwithstanding a provision, that on non-payment, he and *his heirs* might re-enter; for the heirs would be mere trustees for the executor.*

35. If a tenant for life and the reversioner join in a lease, reserving rent generally, it will go to the former during his life and then to the latter.²

36. Where a tenant for life, with subsequent limitations, leases under a power to lease, reserving rent to those in reversion or remainder, it has been doubted what disposition the law would make of the rent after his death: because the lessee comes in under the original conveyance creating the power, and therefore a reservation of the rent to the heir of tenant for life, or the reversioner, or remainderman, they not being the personal representatives of the tenant, would be void. But it has since been settled, that such reservation is good, and that a remainderman, being a privy in estate, may distrain for the rent. In such case, the most clear and sure way is to reserve the rent yearly during the term, and leave the law to make the distribution, without any express reservation to any person.⁴

37. With regard to the persons to whom rent may be reserved, substantially the same remark may be made, that was made with refer-

¹ Hard. 95. Co. Lit. 47 a and ns. 8, 9. Wooton v. Edwin, 12 Rep. 36.* 1 Ventr. 161. Sacheverell v. Froggatt, 2 Saun. 367, and ns.

² Jenison v. Lexington, 1 P. Wms. 555.

³ Co. Lit. 214 a.

⁴ Chudleigh's case, 1 Rep. 139 a. Harcourt v. Pole, 1 And. 273. 2 Saun. 369, n. 4.

* Marginal note. "This case will hardly be held for law at this day."

ence to the property out of which rent may issue. A reservation to other persons than those above designated, though invalid as technically a *rent*, may be good as a *contract*. Thus, if the lessee covenant to pay the debts of the lessor, as rent, he becomes liable as a trustee, but no distress lies against him.¹

38. From what has been said it appears, that rent is *incident* to the reversion. Hence, by a general grant of the latter, the former will also pass; though not the converse. The rent may be separated from the reversion, but there must be a clear intention, or a necessary implication, to that effect.

39. A, and B, his wife, lease land jointly owned by them, reserving rent. A dies, having devised the *reversion* to B. B marries C and dies, and then C dies. The heirs of C shall not have the rents accruing after his death, upon the ground of their being separated by the devise from the reversion, and therefore vesting absolutely in C.²

40. In Delaware, a statute provides, that rent in arrear shall not be assignable with the reversion. It is a chose in action, upon which an assignee cannot sue in his own name.³

41. With regard to the time when rents are payable, it is said, if there is no express stipulation, they are payable at the end of a year.⁴ But usage will control this presumption, and render them payable semi-annually or quarterly. In the city of New York, rents are made payable quarterly.

42. And this legal implication will be controlled by any express agreement.

43. If the rent is made payable *annually during the term*, the first payment to begin two years after; the latter clause shall prevail.⁵

44. If rent is reserved to be paid at two certain periods, an equal portion of the whole shall be paid at each.⁶

45. If rent is made payable at two certain times or within thirteen weeks thereafter, the latter clause is for the benefit of the tenant, and the rent is not due till the end of the thirteen weeks. Hence, if the lessor were a tenant for life and die before this time, his executors cannot sue for the rent. But if it were merely provided, that unless the rent were paid within thirteen weeks from the time fixed, the lessor might re-enter; this would be a mere dispensation of the entry, and the rent would be due at the appointed day. And the extension of time above-mentioned is granted only during the continuance of the contract, and for the instalments of rent prior to the last. The last instalment is payable on the day specified, upon which the lease itself terminates.⁷

¹ *Ege v. Ege*, 5 Watts, 134.

² *Condit v. Neighbor*, 1 Green, 83.

³ Dela. St. 1829, 370. *Demarest v. Willard*, 8 Cow. 206.

⁴ Lat. 264. 3 Bulstr. 329. 3 Kent, 374. 3 Cruise, 194.

⁵ *Ib.*

⁶ 2 Rolle's Abr. 450.

⁷ *Clun's case*, 10 Rep. 127. *Glover v. Archer*, 4 Leon. 247. *Barwick v. Foster*, Cro. Jac. 233, 310. *Biggin v. Bridge*, 3 Leon. 211. 3 Keb. 534.

46. A rent, before it is due, is incident to the reversion, and therefore real estate. But after it is due, it is personal estate. In the former case, upon the death of the landlord, it passes to his heir; in the latter, to his executor or administrator. It seems, at common law, neither the heir nor executor of a lessor could recover rent after his death, which was due in his life-time; but Statute 32 Henry VIII., c. 37 (2 Ruff. St. 297), provided otherwise.

47. Rent is said to pass *prima facie* to the heir, unless the lessor had a mere chattel interest. Hence, if the executor claims it, he is bound to prove his title.¹

48. Rent, in general, is not due, till the last minute of the natural day on which it is made payable. Hence, if the lessor die during that day, the rent passes to his heir. This rule applies however only to leases by owners in fee or under a power. Where a lease is made by a mere tenant for life, if he die at any time during the day when the rent is payable, it passes to his executors. Though, for the benefit of the lessee, he has till the last instant of the day to pay the rent, yet, it is said, as soon as that day begins, he is at his peril to take care that it be paid. And more especially does the principle apply, where the tenant for life dies after sunset of that day; because he is bound then to pay, under penalty of forfeiting his lease after demand.²

49. In case of a lease by tenant for life under a power, it has even been held, that where the tenant had received the rent before sunset on the day when it was payable, his executors should pay it over to the remainder man. This decision however has been doubted.³

50. At common law, there could be apportionment of rent *as to time*, either in law or equity. Hence when a lessor, tenant for life, died before rent day, the rent was lost. But the Statute 11 Geo. 2, ch. 19, provides otherwise. And in New York, New Jersey, Missouri and Delaware,* statutes provide, that if a tenant for life, lessor, die on the rent day, his executors may recover the whole rent; if before, a proportional part of it. In Missouri, Kentucky,† Delaware and New York, where one is entitled to rents depending on the life of another, he may recover them notwithstanding the death of the latter. In Delaware, Virginia, Missouri and Kentucky, it is specially provided,

¹ 1 Cruise, 196-7. 2 Ky. Rev. L. 1349. *Williamson v. Richardsons*, 6 Mon. 595.

² 1 Saun. 287, n. 17. *Southern v. Bellasis*, 1 P. Wms. 179. *Strafford v. Wentworth*, 1 P. Wms. 180. *Prec. in Chan.* 555.

³ *Rockingham v. Penrice*, 1 P. Wms. 178.

* Another statute provides, that where a lessor, having a life estate or other uncertain interest, dies before the rent is due, it shall be divided between his executor or administrator, and the heir, devisee, reversioner or remainderman. A similar provision in Virginia. 1 Ky. Rev. L. 668. 1 Vir. Rev. C. 166.

† Tenant for life, or upon any contingency. In this State, if rent have been paid in advance, so much as applies to that part of the term which is destroyed by the lessor's death, shall be refunded.

that a husband, after the death of his wife, may recover the rents of her lands.¹

51. Rent, before the appointed day of payment, is not *debitum in presenti, solvendum in futuro*, but is a *contingent* claim, liable to be wholly defeated by many intervening acts or events.²

52. For the recovery of rents, the law has provided several remedies.

53. The first is a *distress*. At common law, this was applicable only to a *rent service*, but it has been extended by statutes to the other kinds of rents; and also to the executors or administrators of the proprietors, after the determination of their leases.³

54. Distress, is the seizure of a tenant's cattle or other personal property upon the land, for non-payment of rent, for the purpose and with the right of selling them to obtain payment.

55. It is said,⁴ there never has been a process of distress for rent in Massachusetts, and probably the right does not exist. The same is true of the other New England States, and the States of Alabama, Mississippi, North Carolina and Ohio. In Kentucky, a distress lies only for pecuniary rent.

56. A reversion is necessary to the remedy of distress. Hence, if a lessee assign, reserving rent, he cannot distress unless it is so agreed. Otherwise, where he underlets.⁵

57. A lease, or grant of a rent-charge, or conveyance in fee, reserving rent, usually contains a condition,⁶ that if the rent shall not be paid when due, the lessor or grantee may re-enter, and either determine the lease, or hold till he shall be satisfied, or receive the profits in satisfaction. In the first case, the entry absolutely defeats and determines the lessee's estate; in the second, the lessor is entitled to the profits of the land for his own use until the rent be paid—the object of such provision being merely to hasten payment; and in the last, the profits shall be applied in payment of the rent, and when paid, or after tender upon the land of what remains due, the lessee shall have back the land. A Court of Equity, however, makes no distinction between the two last mentioned cases, but compels the lessor to account for the surplus received from the land after paying the rent and charges. Where the lessor enters to take the profits, he acquires no freehold, but an interest in nature of a distress, which on his death passes to the executor, not to the heir, though expressly reserved to the latter. And a proviso for such entry is not strictly a *condition*, which, as will be seen hereafter, must determine the *whole estate*; but a *limitation*

¹ 3 Kent, 376. Misso. St. 376. 1 N. J. Rev. C. 186-7. 1 N. Y. Rev. St. 747. 1 Vir. Rev. C. 156. 2 Ky. Rev. L. 1351. Dela. St. 1829. 365. See infra p. 167.

² Wood v. Partridge, 11 Mass. 493. 3 Watts, 402.

³ 3 Cruise, 197.

⁴ 4 Dane, 126. 7 Pick. 105. Aik. Dig. 357. 4 Griff. 1143. 3, 404.

⁵ Ege v. Ege, 5 Watts, 134.

⁶ In Georgia, a statute provides that when the rent becomes due and is unpaid, the lessor may re-enter. It seems no condition in the lease is necessary. Prince, 687.

to the lessor on failure of payment, and upon payment back again to the lessee.¹

58. For the purpose of distress, no previous demand of the rent is necessary, or, if expressly required, it may be made after the day when the rent falls due. But an entry for breach of condition, if made before such demand, is tortious. It is said, that the condition is in derogation of the grant; and that the tenant is to be presumed to be residing on the premises in order to pay the rent, for the preservation of the estate, unless the contrary appears, by the feoffor's being there to demand it and actually making a demand, and by the tenant's wilful default.²

59. But in one case it was held, that where rent was made payable quarterly, with a proviso that if it were in arrear twenty-one days after the day, being lawfully demanded, the lessor might re-enter; and the rent remained five quarters in arrear, there being no distress upon the land; the lessor might re-enter without demand.^{3*}

60. In the creation of rent-charges, it is usual to reserve a right of entry by way of use, which, as incident to the rent, becomes executed by the statute of uses as a legal estate. Thus lands are conveyed to A, to the use, intent and purpose that B may receive out of them a certain annual sum or rent-charge; and to the further use, &c. that if the rent be in arrear for a certain time, B or his assigns may enter and receive the profits till satisfied. When the rent becomes in arrear, the use springs up from the seisin of A, and ceases with the payment. If the rent-charge is assigned, the right of entry passes along with it.⁴

61. The common law imposes very strict terms upon a lessor in regard to the demanding of rent; requiring that it be done upon the land, at the most public and notorious place, such as the front door, or if there is no house, at the gate of the land, and before sunset of the day when the rent falls due, that the money may be counted. In New York, it is said these rules are in force, unless dispensed with in certain cases by statute. But in New Hampshire, it has been questioned whether they are adopted in all their strictness. And in New Jersey they are held inapplicable, where the tenant denies his holding, or forbids and prepares to resist a distress; or where, by the condition of re-entry, the lessor is merely to hold till paid from the profits. The condition will be saved, either by a tender upon the land, that is, a readiness to make a tender, or a personal offer to the lessor, of the land.⁵

¹ Lit. 327. Co. Litt. 203 a. Ib. n. 3. *Jemmot v. Cooly*, 1 Lev. 170. T. Ray. 135, 158. *Wartenby v. Moran*, 3 Call, 424. Co. Lit. 203 a. n. 2. *Farley v. Craig*, 6 Halst. 270-1.

² Co. Lit. 144 a. 4 N. H. 251. Gilb. 173.

³ 4 Dane, 127. 3 M. & S. 525.

⁴ Gilb. 37.

⁵ *Jackson v. Kipp*, 3 Wend. 230. 2 N. H. 164. 6 Halst. 262. 3 Kent, 374. 1 Sann. 287, n. 16.

* But this decision was founded upon an English statute; and Lord Ellenborough dissented.

62. An action of debt lies upon a *lease for years*, for rent. And leases usually contain a covenant, upon which the action of covenant may be brought. At common law, *debt* does not lie for rent upon a *lease for life*. Otherwise by St. 8 Anne, c. 14. Similar acts have been passed in New York, New Jersey, Virginia, Kentucky, Missouri and Illinois. In Illinois, in case of a lease for life, and an occupation without any special agreement for rent, the owner, his executors, &c. may recover the rent or a fair satisfaction for use and occupation, in *debt* or *assumpsit*.¹

63. In addition to the remedies above named, there is the action of *assumpsit* for *use and occupation*, where the letting is not by deed. This action is specially provided in New York, New Jersey, Delaware, Indiana and Missouri, and any unsealed agreement for a certain rent may be used as evidence of the amount to be recovered. In Alabama, this action lies by statute even upon a lease by deed, if no certain rent is agreed upon. But in Massachusetts it is held, that *assumpsit* will not lie in case of a sealed lease, even upon an express parol promise to pay the rent; nor will it lie where the tenant entered as a trespasser. And though *assumpsit* lies for rent, yet, as it issues from the realty, a bond given for rent, reserved merely by parol, is no extinguishment of it.²

64. A, an executor, leases land of the deceased by parol, for one year. The will was afterwards set aside, and the plaintiff, an heir, having been appointed administrator, brings *assumpsit* against the lessee for rent. Held, the action would not lie; for if A was authorized by the will to lease, the contract was with him individually, and either he or his representative must enforce it; if not authorized, the lessee had made no contract with the plaintiff, but as to him was a trespasser.³

65. Although a lessor may at his election sue or distrain for rent, or enter for non-payment of it by virtue of the condition, yet he cannot do both, and the bringing of a suit or making a distress will be held a waiver of the condition, because it affirmeth the rent to have a continuance. But he may receive the rent and acquit the same, and yet enter for condition broken. But if he accept a rent due at a day after, he shall not enter (for the prior breach), because the acquittance for this raises a presumption that all other instalments have been paid. Recovery upon a covenant for rent is no bar to a subsequent distress.⁴

66. It is said, that though the lessor receive part of the rent, he may re-enter for the residue.⁵

¹ Co. Lit. 47 a, n. 4. 1 N. Y. Rev. St. 747. 1 N. J. R. C. 186. 1 Vir. do. 155. 2 Ky. Rev. L. 1354. Illin. Rev. L. 675. Misso. St. 376.

² 1 N. Y. Rev. St. 748. 1 N. J. Rev. C. 187. Ind. Rev. L. 424. Misso. St. 377. Dela. St. 1829, 365. 2 Whart. 42. 4 Day, 228. Aik. Dig. 357. Codman v. Jenkins, 14 Mass 93. 2 Gill. & J. 326. Cornell v. Lamb, 20 John. 407.

³ Boyd v. Sloan, 2 Bai. 311.

⁴ Co. Litt. 211 b. 373 a. Jackson v. Sheldon, 5 Cow. 448.

⁵ Ib. n. 1.

67. Statute 4 Geo. II. provided that a lessee should have restoration of his land, on paying the rent, &c. in six months from judgment against him ; or, if he paid before judgment, that the proceedings should be staid.¹ It is said in New Hampshire, though this statute is not expressly adopted, the principle of it is in force.²

68. In Illinois, Missouri, New York and New Jersey, where a half year's rent is due, and there is a right of re-entry, an ejectment may be brought without demand ; and, if execution be levied before the arrears and costs are paid, the lease is avoided, unless the judgment be reversed for error, or the tenant, or in New York any party interested, obtain relief in Chancery by a bill filed in six months from judgment. But he may stay the suit by a tender before final judgment. In Missouri, New Jersey and New York, a mortgagee of the lease, not in possession, may avoid the judgment within six months, by paying the rent, costs and charges, and performing the agreements of the lessee. In New York, the landlord shall account, on settlement, for all that he has made from the land, or might have made but for his wilful default.³ In Kentucky and Delaware,⁴ the law so far favors the claim of rent, that a landlord, upon making oath that his tenant is likely to leave the county before rent day, may have a process of attachment before the rent is due.

69. In some cases, Chancery will lend its aid for the recovery of rent ; but only where there is no effectual remedy at law. Nor will it change the nature of the rent, so as to create a liability, unless there is fraud in preventing a distress.⁵

70. With regard to the estates which may be had in a rent, they are in general the same with the estates in land already described. Thus, a man may be tenant in fee, in tail, for life or for years of a rent-charge. A rent-service, being incident or annexed to the land itself or the reversion therein, is of course subject to the same limitations and dispositions as the reversion, and a rent-charge, though not thus incident, may be held in the same ways as the lands themselves.

71. In some cases, where a peculiar form of reservation has been adopted, a question has arisen whether the rent should be a fee-simple or only a chattel interest. Thus where rent was reserved to the lessor, *his heirs and assigns* ; one sum for a certain number of years, then a larger sum for another term of years, and a new valuation to be afterwards made at the end of successive long terms, and the rent fixed accordingly, *to be paid forever* ; held, this last clause imported, that the rent first fixed should be perpetual, being subject to increase but not to diminution ; and that the rent was a fee-simple, not a *session* of chattel interests, passing to executors.⁶

¹ See 3 Rep. 64, 65. Noy, 7.

² 2 N. H. 163.

³ 2 N. Y. Rev. S. 505-7. Illin. Rev. L. 676. Misso. St. 377. 1 N. J. R. C. 189-90.

⁴ 2 Ky. Rev. L. 1353. Del. St. 1829, 365-6.

⁵ 3 Cruise, 199.

⁶ Farley v. Craig, 6 Halst. 262.

72. In case of an estate *pour autre vie* in a rent, there could be no general occupancy after the owner's death, living the *cestui que vie*; because from the nature of the thing no entry could be made upon it, and the terms of the grant made no provision for such occupancy. Hence, at the death of the tenant for life the rent terminated. But if the rent is limited to one *and his heirs* for his life and the lives of others, his heir shall hold upon his death, as special occupant, by nomination and by descent. So if the limitation is to executors, it seems to be now settled, although anciently doubted, that the executors may take as special occupants. And it is presumed that the same rules upon this subject apply to rents, which have already been stated in regard to lands themselves.¹

73. Rents are subject to curtesy. And *seisin in law* is sufficient to give curtesy in a rent-charge, being often the only possible seisin. And it seems there shall be curtesy, even though the rent were granted to the wife, the first payment to be made at a future time, which did not arrive before her death; because the grant was immediate, though the payment was future.²

74. If a woman makes a gift in tail, reserving rent to her and her heirs, marries and has issue, and the donee dies without issue, and then the wife dies; the husband shall not have curtesy in the rent, because it has terminated by act of God, and no estate in it remains. But if a man be seised in fee of a rent, and make a gift in tail general to a woman, who marries and has issue, and the issue die, and the wife die without issue—he shall be tenant by the curtesy of the rent, because it remains.³

75. Rents are subject to dower, as has been already stated, in reference to a rent-service. A rent-charge is also subject to dower. But a personal annuity is not. And if a widow sue the heir for her dower in a rent-charge, he cannot defend upon the ground that he claims the provision as an annuity, since he can so elect only by bringing a writ of annuity.⁴

76. In regard to dower, however, as well as curtesy, a distinction is made between a rent-charge *de novo*, and one already *in esse* in which an estate of inheritance is created.⁵

77. Thus, where a rent *de novo* is granted to a man and the heirs of his body, and he dies without issue, his widow shall not be endowed—the rent being absolutely determined by his death. It is otherwise, where a remainder is limited upon the estate tail. In such case, for the purpose of dower, the rent shall continue against the remainderman.

¹ *Salter v. Boteler*, Vaugh. 199. 1 Salk. 189. *Bowles v. Poore*, Cro. Jac. 232. 3 P. Wms. 264, and n. *Buller v. Cheverton*, 2 Rolle Abr. 152. *Supra* ch. 4.

² Co. Lit. 29 a.

³ Co. Lit. 30 a.

⁴ *Supra* p. 64. Co. Lit. 32 a. Ib. 144 b.

⁵ *Chaplin v. Chaplin*, 3 P. Wms. 229.

78. And if a rent already *in esse* be entailed, the widow shall be endowed, though the husband died without issue.

79. A remainder in a rent-charge may be limited upon a life-estate, or upon an estate tail, even though the rent be created "*de novo*," and therefore, without the remainder, there would be no reversion in the grantor.¹

80. A rent *de novo* may be created *in futuro*; because such grant of a new right has not the effect of putting a precedent estate in abeyance, which it has been seen is against the policy of the law. But a rent *in esse* is subject to the same rule in this respect with the land itself, because there was a precedent estate in it; and such grant, dividing the title, produces an uncertainty as to the legal owner.²

81. A rent *de novo* may be limited to cease for a time, and then revive. Thus it may be limited to one and his heirs, and, if the grantee die leaving a minor heir, the rent to cease during his minority. In such case, if the widow sue the tenant for dower, she shall have execution when the heir comes of age.³

82. So a rent may cease for a time for reasons independent of the original limitation, and afterwards revive, when those reasons cease to exist.

83. Lands, leased by trustees, were by an act of the Legislature confirmed in fee to the tenants, they paying a certain rent to the trustees, and all taxes upon the value of the land over and above the rent. By a subsequent act, the lands were taxed like other lands, and the Legislature assumed the payment of the rent to the trustees. Afterwards, the lands ceased to be taxed. Held, the rent, originally payable by the tenants to the trustees, revived; that the true construction of the latter act was, that the rents should be paid from the taxes, only while such taxes were laid; that the rents could not be discharged without the assent of the trustees, and their acquiescence in receiving them from the government was only an adoption of that mode of payment, not a waiver of any payment.⁴

84. The Statute of Uses is applicable to rents. Thus, if a rent-charge be limited to A in trust for B, the statute executes the use in B. And if there be also a clause of distress, and a covenant to pay the rent to A to the use of B, the right of distress will vest in B as incident to the rent; but the covenant will not, being merely collateral.⁵

85. But a use upon a use, in rents as well as lands, is not executed by the statute. Thus, where one conveyed lands to the use and intent that certain trustees should have a rent-charge in fee, and then the rent to be to the use of A in tail male, remainder over; held,

¹ 3 Cruise, 203.

² Fitz. Abr. Dower, 143. Jenk. Cent. 1. ca. 6.

³ Adams v. Bucklin. 7 Pick. 121.

⁴ Gilb. 60.

⁵ Cook v. Herle, 2 Mod. 128.

the widow of the issue of A was not dowable, he having only a trust.¹

86. Where a person is once seized of a rent, he cannot lose his right merely by *non-user* or failure to receive it, or even by an adverse claim and receipt of it by another man, and an attornment to him. Rent being a mere creature of the law and collateral to the land, the right always carries with it the possession. The maxim is, "*nemo redditum alterius, invito domino, percipere aut possidere potest.*" The owner of a rent may, however, consider himself disseised, and bring an action accordingly, at his election, for the purpose of more speedy and effectual redress.²

87. A rent is not *forfeited* by an attempt to convey a greater interest in it than the owner possesses, because he can pass only his own title.³

CHAPTER XVII.

RENT—DISCHARGE AND APPORTIONMENT.

- | | |
|---|--|
| 1. General rule—no apportionment as to time. | partial; loss by fire; debt and covenant. |
| 4. Eviction by landlord or third persons; from the whole or a part of the premises. | 24. Purchase of the land by landlord—effect upon a rent service. |
| 7. Constructive eviction. | 25. Descent to landlord. |
| 9. Eviction by mortgagee. | 26. Apportionment by transfer of the land. |
| 11. Other cases of eviction. | 28. Lease by tenant for life. |
| 12. What is not an eviction. | 32. Rent-charge—when extinguished and when not. |
| 16. Loss by act of God, &c.—total or | 36. When apportioned. |

1. RENT service being a retribution for the use of land, the general principle is, that if by any means the tenant is deprived of the land, as by quitting or assigning the premises, with the lessor's consent, or by eviction under a paramount title; his obligation to pay rent ceases. An eviction will not discharge the liability for rent previously due; but, if it take place at any time before the appointed day of payment, there will be no apportionment, but the whole will be discharged.⁴ It is intimated, however, that if the lessee has derived a

¹ Chaplin v. Chaplin, 3 P. Wms. 229.

² 10 Rep. 97 a. Co. Litt. 323 b. Gilb. Ten. 104. Litt. 588-9, 237, 240.

³ Co. Litt. 351 b.

⁴ Gilb. 145. 11 Mass. 493. 1 Har. & G. 308.

substantial benefit from the use of the estate for a part of the term, he may be liable on a *quantum meruit*. The case is compared to that of a charter-party, where the whole contract of affreightment is not fulfilled, but the goods have been carried to an intermediate port.¹

2. Where a lessee covenants to pay rent in advance, it may be paid at any time during the day on which it is payable, and, if evicted by paramount title on that day, he is discharged.²

3. If the lease is made by a mortgagor, and the mortgagee enters for condition broken, and threatens to expel the lessee unless he pay the rent to him, which the lessee agrees to do and actually does; this is an eviction.³

4. Eviction may be made either by the landlord himself without title, or by a third person under a paramount title. And where it applies to the whole land, an eviction in either of these modes has the same effect of discharging the rent. But where the tenant is evicted from only a part of the land—if by a stranger, the rent shall be apportioned*—if by the lessor himself, the whole will be discharged.⁴

5. As to the question, what shall constitute a part of the premises with reference to an eviction; if the lessee retains merely certain articles appurtenant to a building from which he is turned out, as for instance the tools and machinery in a mill; this is held to be an eviction from the whole, though it seems he would be liable upon a *quantum meruit* for the use of the articles.⁵

6. The establishment of a right of common in the lands, will not operate at law as an eviction to apportion the rent, not being a title to the soil. But, it seems, there will be an apportionment in Equity, unless the land be still fairly worth the rent reserved.⁶

7. There are some cases, where, although there is no actual eviction, yet the law will attach the same consequence to the acts done, viz. a discharge of the rent—the tenant having lost the use of the land.

8. A leased a house to B for one year. B endorsed to A the note of a third person, as security for the rent; occupied for two quarters, for which he paid, and part of a third; at the end of which time he removed, delivering up the key. A then let the house to C, and delivered her the key; and afterwards sued the note in his own name, and obtained full satisfaction of the judgment. B brings assumpsit against A, for money had and received. Held, he should recover the amount of the note and interest, deducting the balance due for a part of the third quarter's rent: that A might be considered as B's agent

¹ Fitchburg, &c. v. Melven, 15 Mass. 270.

² Smith v. Shepard, 15 Pick. 147.

³ Ib.

⁴ 3 Kent, 376. Dyett v. Pendleton, 8 Cow. 727. Co. Litt. 148 b. 4 Wend. 423.

⁵ Fitchburg, &c. v. Melven, 15 Mass. 268.

⁶ Jew v. Thirkwell, 1 Cha. Cas. 31.

* So, where an absolute purchaser of land is evicted from only a part of it, this is no ground for rescinding the whole contract. Simpson v. Hawkins, 1 Dana, 305.

in procuring a new tenant, and thus responsible for the rent ; or, if not, as having ousted B from the house, or consented to an assignment of the term to C, and accepted rent from her, which would discharge B.¹

9. If the tenant is in law evicted, before the rent day arrives, by a mortgagee, claiming under a mortgage prior to the lease, he is discharged from the whole rent (notwithstanding, it seems, he afterwards continues to occupy), because, after the entry of the mortgagee, the tenant is accountable to him.²

10. If the mortgage is subsequent to the lease, the mortgagee may receive the rent, or suffer the mortgagor to receive it at his election. If he does nothing to elect to receive it himself, the mortgagor may recover it, notwithstanding the mortgage ; but, after demand from the mortgagee, the tenant is not liable to the mortgagor.³

11. A leases to B a portion of his land ; afterwards conveys the whole land to C in fee, reserving rent ; and then, for non-payment of rent by B, accruing after the deed to C, enters and distrains. This is an eviction of C, which suspends his whole rent.⁴

12. Where one having a paramount title made an entry upon the lessor before he gave the lease, but he refused to deliver possession, and the former then brought a real action, and recovered judgment after the lease was made ; held, such entry was no eviction to bar a suit for the rent.⁵

13. A mere breach of covenant by the lessor does not excuse from the payment of rent, though the covenant is one, the performance of which would increase the value of the premises. Thus, where a lessor in fee covenanted that the lessee should have common of pasture and estovers from other lands of the lessor, and afterwards *approved* the lands, thereby destroying the common ; held, this covenant could not be construed as a grant, and the breach was no defence to a suit for the rent.⁶

14. Nor will the erecting by the landlord of a nuisance upon adjoining land, have the effect of an eviction as to payment of rent.⁷

15. A mere entry upon the land by the landlord is simply a trespass, and not an eviction which discharges the rent.⁸

16. In the cases above mentioned, the tenant is deprived of his land by the fault of the lessor ; consisting either in a wrongful entry made by himself, or in conveying a defective title, which is afterwards defeated by third persons. But there are other cases of a different

¹ *Randall v. Rich*, 11 Mass. 494.

² *Fitchburg, &c. v. Melven*, 15 Mass. 268.

³ *Newall v. Wright*, 3 Mass. 153.

⁴ *Lewis v. Payn*, 4 Wend. 423.

⁵ *Fletcher v. McFarlane*, 12 Mass. 43.

⁶ *Watts v. Coffin*, 11 John. 495. *Etheridge v. Osborn*, 12 Wend. 529.

⁷ *3 Kent*, 371.

⁸ *Wilson v. Smith*, 5 Yerg. 379.

sort, where the tenant loses his land or buildings, wholly or in part, by inevitable accident or irresistible force. Upon this point, the following distinctions seem to be established, though not with the perfect clearness that might be desired.

17. Where the tenant is deprived of the use of the leased premises, he is discharged from any mere *legal liability* resulting from his lease and occupancy, such as *waste*. But if he has expressly covenanted or agreed to pay rent, he still remains liable as before, to an action of *covenant*, or an action of *debt*.¹

18. Thus, if an army enter upon the land and expel the tenant, he is still bound for the rent.* So, if a house is accidentally burned, although the lessee covenanted to keep the premises in repair, casualties by fire only excepted; his covenant to pay rent will bind him during the term.² And where, after a loss by fire, a tenant brought ejectment against the landlord for the house, rebuilt where the former one stood, as a long time had elapsed after the fire, and the landlord, although not bound to rebuild, and legally entitled to the rent, had not since enforced it; it was left to the jury to consider, whether the plaintiff had not waived his right to the premises at the time of the fire, and they found for the defendant.³

19. The principle above stated is founded upon the considerations, that a lease for years is a *sale* for the term, and unless there are express stipulations, the lessor does not insure against inevitable accidents, or any other deterioration, and that losses by fire generally arise from the carelessness of tenants, which it is the policy of the law to restrain.⁴

20. The above rule is well settled at law. But in Equity it has been held, that a loss by fire as effectually discharges the rent, as an eviction by title; and, although the landlord may maintain an action at law, Equity will restrain it by injunction, until the house is rebuilt; especially where he was *insured*. Neither landlord nor tenant is bound to rebuild, unless it is so expressly agreed.⁵

21. But it is said, that there is no general rule in a court of Equity to relieve in such a case. It will afford relief only under particular circumstances. In very late English cases, Chancery has refused to interfere; and Chancellor Kent regards this as the settled doctrine.⁶

¹ *Padine v. Jane*, 1 Rolle's Abr. 946. *Alleyn*, 26. Sty. 47.

² *Monk v. Cooper*, 2 Ld. Ray. 1477. *Hallett v. Wylie*, 3 John. 44.

³ *Belfour v. Weston*, 1 T. R. 310. *Ib.* 710. *Baker v. Holtzaffell*, 4 Taun. 45.

⁴ 6 Mass. 67. 3 Kent, 373-4. *Cline v. Black*, 4 M'Cord, 431.†

⁵ *Treat. of Equity*, B. 1, ch. 5, s. 8. *Brown v. Quilter*, Amb. 619. *Steele v. Wright*, 1 T. R. 708. *Gates v. Green*, 4 Paige, 355.

⁶ *Doe v. Sandham*, 1 T. R. 710. *Fowler v. Bott*, 6 Mass. 68. *Hare v. Groves*, 3 Anst. 687. *Holtzaffell v. Baker*, 18 Ves. 116.

* One of the earliest cases on this subject arose from a tenant's being driven from his land, in the reign of Charles I., by Prince Rupert and his soldiers. And the action was not covenant, but debt. The reservation was held to make a covenant in law. *Paradine v. Jane*, Alleyn, 26.

† In this case, the English rule on the subject is treated as doubtful. (And see Amb. 631.)

22. In South Carolina, a lessee may prove, under the plea of *no rent in arrear*, that the house has been rendered almost untenable by a storm, and that the landlord had notice to repair. And in such case the rent may be apportioned, it seems.¹

23. Where a tenant is deprived, by act of God or inevitable accident, of a *part* only of the premises leased, it seems there will be no apportionment of the rent. The earliest case upon this point, was one in which a man hired land and a flock of sheep together. The whole flock having died, it was contended that the rent should be apportioned; but the question was not decided.² Where a mill was carried away by ice, it was held, that the tenant was still bound to pay rent, partly on the ground, that this was only a partial destruction of the property leased—a fishery and other valuable rights being still left.³ If a part of the land be surrounded by water, or swept by wild-fire, there shall be no apportionment. But if a part of it be covered or surrounded by the sea, the rent shall be apportioned, because the tenant loses the use of the land, with very slight chance of regaining it.⁴

24. A purchase, by the landlord from the tenant, of his whole interest, will discharge or extinguish the rent. But a purchase on condition, or of a part only of the tenant's interest, will not extinguish but merely suspend the rent, which, upon the termination of the particular estate purchased, or performance of the condition, and the restoration of the land to the tenant, will revive. So, if the landlord purchase only a part of the lands, the rent will be extinguished proportionally for these, but still continue for such part of the lands as are retained by the tenant. So a landlord may release a part of the rent, and the rest will remain.⁵ But if the rent be payable in some indivisible thing, as a horse or a hawk, a purchase by the landlord of part of the land extinguishes the whole rent. On the other hand, if the return to be made is some act for the public benefit—as to repair a road, or keep a beacon—such purchase will not extinguish the rent, even in part.⁶

25. A descent of part of the tenancy to the owner of the rent will not extinguish it, though indivisible.⁷

26. Although formerly doubted, it is now settled, that a rent service, being incident to the reversion, may be apportioned by transferring a part of the latter, with which the rent will pass without any express mention of it. So the rent itself may be apportioned by devise. Thus, one having a rent of £10 may devise £6 part thereof to

¹ Ripley v. Wightman, 4 M'Cord, 447.

² Taverner's case, Dyer, 55 b.

³ Ross v. Overton, 3 Call, 268.

⁴ 1 Rolle's Abr. 236.

⁵ 3 Cruise, 206-7. 1 Bai. 469. Lit. 229. 18 Vin. Abr. 504.

⁶ Gilb. 165. 1 Inst. 149 a. Gilb. 166.

⁷ 3 Cruise, 211.

A, B and C severally, to each a third. In such case each devisee, (and, it seems, the heir at law also) may have a separate remedy for his rent.¹

27. A rent service may also be apportioned by an assignment by an act of law; as where a legal process is levied upon a part of the reversion, or where the widow of the landlord recovers one third of the reversion for her dower.²

28. At common law, if a tenant for life, having underlet the land, died before the rent fell due, neither his executor, nor the reversioner, nor remainderman could recover a proportional part of it. The former could not, because his only claim would be for use and occupation, which would not lie upon a sealed lease; nor the latter, because the rent did not accrue in his time. The St. 11 Geo. 2, ch. 19, s. 15, provides, that in such case the executors, &c. may recover rent for the time that the tenant occupied, *pro rata*; and, if he died upon the rent-day, the whole amount.* But this act applies only where the lease ends with the death of tenant for life. If it does not thus terminate, the rent goes to the person in reversion or remainder.³

29. In Equity, this statute has been held to extend to a tenant in tail dying without issue.

30. Thus, where such tenant, having leased for years, died without issue a short time before rent-day, and the whole rent was paid to the remainderman; held, the executor of tenant in tail might maintain a bill against the remainderman, for such part of the rent as accrued before the tenant's death; upon the grounds, that the case was within the equity, though not the words, of the act; and, where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases; and also (and chiefly) that the tenant, not having been legally bound to pay the rent to any one, the payment should be applied to the benefit of those equitably entitled to the respective proportions.⁴

31. It has been said of the foregoing case, that it seems rather to be a decision what the statute ought to have done, than what it has done. But it was at the same time held, that, where one occupied *from year to year*, under the guardian of an infant tenant in tail, inasmuch as the lessee was in under no lease or covenant, but merely an implied contract, he could not raise an implication that he was to occupy rent free, and, the whole amount having been paid to the receiver, the portion accruing before the infant's death was awarded to his executors.⁵

¹ Collins v. Harding, 13 Rep. 57. Gilb. 173. Ards v. Watkins, Cro. Eliz. 637, 651.

² Campbell's case, 1 Rolle's Abr. 237. Montague v. Gay, 17 Mass. 439.

³ Jenner v. Morgan, 1 P. Wms. 392. 3 Cruise, 213.

⁴ Ambler, 198.

⁵ Vernon v. Vernon, 2 Bro. R. 659. Hawkins v. Kelly, 8 Ves. 308.

* Supra, p. 155.

32. In case of a rent-charge, if the owner of the rent purchase any part of the land from which it issues, the whole rent is extinguished. The reason of this distinction between a rent-service and a rent-charge is, that, while the former, consisting originally in feudal services, was favored by the law, and not allowed to be detached from any lands held by tenants; the latter is against common right, of no public benefit, and issuing out of every part of the land, so that the law will enforce it only according to the original contract.¹

33. But if the grantor of the rent, after such purchase, make a deed to the grantee, reciting the purchase, and authorizing the grantee to distrain for the rent upon the remaining land; this amounts to a new grant.² And, if a part of the land come by *descent* to the owner of the rent, the latter shall be apportioned according to the value of the remaining land.³ If the owner of a rent-charge, issuing out of three acres of land, release one of them from it, the whole is discharged. But if, being entitled to a certain sum, he releases a part of that sum, the balance remains. It is said, that in the latter case, he deals with the rent, which is his own; and in the former, with the land, which is another's.⁴

34. In Pennsylvania, as has been stated, a *ground-rent*, reserved upon a conveyance in fee, is a *rent-service*. Hence, if the owner release a part of the land from it, the remaining land shall be still proportionably chargeable; more especially, if the release has an express saving of such liability.⁵

35. It is said to be a common practice in England, for the owner of a rent-charge to join in conveying that part of the land, which it is agreed to discharge from the rent, with a proviso in the deed, that the rest of the land shall still remain liable. But this, operating as a new grant, the rent will be postponed to any prior incumbrance on the land. Sometimes, where the owner of the lands conveys a part of them, the grantee of the rent-charge covenants not to distrain or enter upon the part conveyed. But, it seems, this might operate as a discharge of the whole rent.⁶

36. A rent-charge may be *apportioned* either by act of parties or act of law. Thus, if the owner assign a portion of it to another, each shall hold his respective share, and be entitled to his remedy. The reason of the rule is, that the whole land remains liable as before, and that the policy of the law, having allowed this kind of rent, will not prevent a distribution of it among children. Anciently, to effect

¹ Co. Lit. 147 b. Gilb. 152.

² Co. Lit. 147 b.

³ Lit. 224. Gilb. 156.

⁴ 18 Vin. Abr. 504. Gilb. 163. Co. Lit. 148 a. 3 Vin. Abr. 10, 11. Farley v. Craig, 6 Halst. 262.

⁵ Supra, p. 150, *Ingersoll v. Sergeant*, 1 Whart. 337.

⁶ 3 Cruise, 209. *Butler v. Monnings*, Noy, 5.

such apportionment, the tenant was obliged to attorn to the assignee ; after which he could not complain of being subjected to two suits instead of one. And although the practice of attornment is now for the most part done away, yet as the tenant may avoid any suit by punctual payment, the rule still prevails. So, a part of a rent-charge may be taken by legal process, which will effect an apportionment.¹

37. If a part of the lands, from which the rent issues, descend to the owner of the rent, the latter shall be apportioned, inasmuch as the party acquires the land by act of law, and not by his own act.²

CHAPTER XVIII.

WASTE.

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1. In treating of estates for life and for years, many incidents or qualities have been noticed, which are common to both estates. It remains to consider another subject, of much importance, the principles of law pertaining to which, are for the most part alike applicable to tenant for life and tenant for years. This is the subject of *waste*. Lord Coke says, "it is most necessary to be known of all men."³

2. Chancellor Kent remarks,⁴ that the American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a

¹ Gilb. 163. 18 Vin. Abr. 504. Farley v. Craig, 6 Halst. 262-273.

² Lit. 224. Gilb. 156.

³ Co. Lit. 54 b.

⁴ 4 Kent, 76.

new and growing country. But, inasmuch as the English doctrine remains wholly applicable in some of the States, and in the rest has undergone very partial change, this doctrine will be first stated, and then qualified by an account of such alterations as the statutes or judicial decisions of the respective States have introduced.

3. Waste is the destruction of such things on the land, as are not included in its temporary profits. In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or whatever tends to destroy or lessen the value of the inheritance.¹

4. Waste is either *voluntary* or *permissive*; the former consisting in some positive act, the latter in mere neglect or omission.

5. Of voluntary waste, there are various kinds.

6. The first and perhaps principal kind is the *felling of timber trees*; which, although the tenant has a qualified property in them for shade and shelter, and for the masts and fruit—he has no right to cut down. But he may cut coppices and underwoods, according to custom, and at seasonable times. He has however no property in the underwood, before it is cut; and therefore cannot have an account of what was wrongfully cut by a preceding tenant.²

7. Where the timber is included in a lease, the lessee may have trespass against the lessor for felling the trees, and the lessor *waste* against the lessee. And if a stranger fell them, each may have his own appropriate action. When the trees are expressly excepted, the lessor has an implied power of going on the land to fell them, and may sue the lessee for any injury done to them. Where the timber is neither expressly included nor excluded, it would seem that the tenant has the right to have it continued, but no right to cut it down, unless waste is expressly authorized.³

8. Timber trees are those used for building, and the question is one of *local usage*. Thus where *birch* trees were used in a certain county for buildings of a mean kind, it was held waste to fell them. So horse-chestnuts and pines. But it is also waste to cut those standing in defence of a house, though not timber, as, for instance, willows, beech, maple, &c. or to cut trees for fuel where there is sufficient dead wood; or to stub up a quickset thorn fence. So it is waste to lop timber trees and thereby cause them to decay; or to destroy or stub up the young germins or shoots; or to cut down fruit trees growing in the garden or orchard, but not those growing elsewhere.⁴

9. It is said, in places where timber is *scant*, it may be waste to cut such trees as are not commonly reckoned to be timber. On the other hand, upon a similar principle, it has been held not to be waste,

¹ 1 Swift, 517-8. ² Co. Lit. 53 a, 11 Rep. 48 b. Pigot v. Bullock, 1 Ves. jr. 479.

³ 11 Rep. 48 a. 1 Saun. 322, n. 5. Foster v. Spooner, Cro. Eliz. 18. Heydon v. Smith, Godb. 173. Jackson v. Cator, 5 Ves. 688.

⁴ Dyer, 65 a. Co. Lit. 53 a. Vin. 442. Cumberland's case, Moore, 812. 7 John. 234. 2 P. Wms. 606. Rex v. Minchin, 3 Burr. 1308.

in Massachusetts, to cut oaks for fire wood, these trees being very abundant and commonly used for this purpose. But it is waste to cut timber-trees and exchange them for fire wood, especially if the latter might be otherwise obtained.¹

10. With regard to the cutting down of timber, it has been held in several of the States, that the strict rules of the English law are not adopted in this country. Thus in New York and Ohio, where the land is wholly wild and uncultivated, the tenant may clear a part of it for cultivation—leaving however enough for the permanent use of the farm, which is a point of fact for the jury. So in North Carolina, the tenant may clear sufficient land to furnish support for his family; and a dowress may cut timber to make into staves and shingles, if this is the common and only beneficial use of the land. So in Pennsylvania,* Virginia and Tennessee, tenants in dower have been allowed to clear wild lands, not exceeding (in the former State) a just proportion of the whole tract. It has already been stated, that in several of the States a widow is not dowable of wild lands, for the reason that they would be of no benefit to her, as the clearing of them would be waste.²

11. In Tennessee, the lessee of a mine, with liberty to smelt ore, may cut timber sufficient for this purpose. And a widow may cut timber on one part of the land to fence another, though the reversions of the respective parcels belong to different heirs. Her rights are not to be affected by any arrangement among third persons. This last point has also been decided in Massachusetts.³

12. As to *buildings*, waste may be done upon them, either by pulling them down, or suffering them to remain uncovered, whereby the timbers rot. But unless they do rot, this is not waste. If uncovered before he came in, the tenant does not commit waste by suffering them to fall; but he has no right to pull them down. If he have done or suffered waste, but repaired before action brought, this is a good defence, but must be pleaded specially, not proved under the plea "*quod non fecit vastum*."⁴

13. The right to cut timber for repairs does not depend upon the obligation to repair. Thus, if a house be ruinous when leased, the

¹ Padelford v. Padelford, 7 Pick. 152.

² Walk. Intro. 278. Jackson v. Brownson, 7 John. 227. Parkins v. Coxe, 2 Hayw. 339. Ballentine v. Poyner, 2 Hayw. 110. Hastings v. Crunkleton, 3 Yeates, 261. Pur. Dig. 221. Findlay v. Smith, 6 Munf. 134. Crouch v. Puryear, 1 Rand. 258. Owen v. Hyde, 6 Yer. 334.

³ Wilson v. Smith, 5 Yerg. 379. Owen v. Hyde, 6, 334. Padelford v. Padelford, 7 Pick. 152. (See *infra* s. 20.)

⁴ Co. Lit. 53 a, and n. 3.

* The Court remark upon the distinction between the state of things in England, where "every part of every tree will bring cash," and in the United States, where lands are in great measure valueless, till cleared; and they come to the conclusion, that if a prudent owner would clear off the timber, and if such clearing raises the value of the land, it is no waste. 4 Watts, 463. (6 Yerg. 334.)

tenant may, though he is not bound to, cut timber for repairs. So even where the lessor has covenanted to repair, or where the lease is without impeachment of waste for the house only.¹

14. Lord Coke says it is waste to build a new house (meaning probably with timber cut upon the land), and to suffer it to be wasted is a new waste. And if the tenant suffer the house to be wasted, and then fell timber to repair it, this is *double* waste.²

15. It is waste to convert a dwelling house into a store or warehouse, because the safety and permanency of the building are thereby endangered. So, to convert two chambers into one, or the converse, or a hand-mill into a horse-mill.³

16. It is waste to pull down a house, though a new one be built, if the latter is smaller than the former. Otherwise, if the former house fall down, and a smaller one is built. To build a larger one in this case with timber from the land is waste. But not to abate a new house, which has never been covered.⁴

17. It is waste to remove any thing attached to the premises, either by the lessor or the lessee, unless removable upon the principles of the law of fixtures, which have been already explained.⁵ (Supra p. 11).

18. It is said, with particular reference to the alteration of buildings, that the strictness of the law in relation to waste has been carried to an unwarrantable extent; and that the cases are very discordant. In a recent case in England, the opening of a new door in the building was held to be no waste, unless it impaired the evidence of title. In a recent case in this country, where the lessee of "a store and cellar" raised the store from one to two feet, and finished off a victualling cellar, for which the cellar had never before been used; held, this, of itself, would be waste, but, as the lessor had covenanted that the lessee might "repair, alter and improve," this was a permission to make the alterations.⁶

19. At common law, a tenant for life was not liable for loss by fire, whether accidental or negligent. But such loss was held to be waste under the Statute of Gloucester. A later statute, however, of 6 Anne, c. 31, s. 6, 7, exempts all tenants from liability for accidental fire, unless it arises from some contract with the landlord. A general covenant to repair, binds the tenant to rebuild in case of fire. Hence it has become usual specially to except such loss.⁷ (See supra p. 141).

20. It is waste to dig for clay, gravel, lime, stone, &c. except for

¹ Co. Lit. 54 b.

² Co. Lit. 53 a. b.

³ Douglass v. Wiggins, 1 John. Ch. 435. Co. Lit. 53 a. n. 3.

⁴ Bro. Abr. Waste, 93. Co. Lit. 53 a. and n. 4.

⁵ Co. Lit. 53 a.

⁶ Young v. Spencer, 10 Barn. & Cr. 145. Hasty v. Wheeler, 3 Fairf. 436-7. Doe v. Jones, 4 Barn. & Ad. 126.

⁷ 1 Cruise, 137. Chesterfield v. Bolton, 2 Com. R. 626. Pasteur v. Jones, Cam. & Nor. 124. 6 T. R. 651. 1 Bibb, 536.

repairs or manurance. So also to open a new mine ; but not to work one already opened, or to open new pits or shafts for working the old veins, because they could not otherwise be wrought. If mines are expressly included in the lease, and there are open ones, these only are embraced. But if there are no open ones, those unopened will pass.¹

21. Where certain salt-works were devised for life, subject to the payment of large legacies ; held, the devisees might, to any extent, use the salt, and the woodland used by the testator for fuel in carrying on the works.²

22. But it is said, the tenant cannot take timber to use even in mines that are open.³

23. Anciently, *the conversion of one kind of land into another*, as, for instance, of pasture into arable, was waste, because it not only changed the course of husbandry, but tended to obscure the title. But it has been said that the pasture must have been such immemorially, and not merely *long before*, and, in the improved state of agriculture of modern times, the old rule may be considered as greatly relaxed, if not wholly obsolete. But where, in the creation of the estate, there was an express prohibition against ploughing land unfit to be ploughed, Chancery will interpose by injunction to prevent it.⁴

24. If a tenant by an act of good husbandry produces consequences of injury which could not reasonably be foreseen, he shall not be held guilty of waste. Thus, where a tenant diverted a creek into a swamp, whereby the trees were killed, and the lessor lay by twenty years, during which a new and better growth sprung up ; held, no forfeiture of the lease for waste.⁵

25. It is waste in England to destroy *heir-looms* ; as, for instance, to destroy so many deer, fish, &c. as not to leave enough for the stores.⁶

26. *Permissive* waste consists chiefly in suffering buildings to decay. But, if ruinous when leased, the tenant is not bound to repair, though justified in cutting timber for that purpose, because the law favors the maintenance of houses. And, in Massachusetts, he may cut timber trees and sell them to procure boards for repairs, if this course be economical and beneficial to the estate.⁷

27. Chancery will not decree that a tenant for life repair, nor ap-

¹ Co. Lit. 53 b. 54 b. Saunders' case, 5 Rep. 12. (See Whitfield v. Bewit, 2 P. Wms. 240).

² Findlay v. Smith, 6 Munf. 134. (See *supra* a. 11).

³ Co. Lit. 53 b. n. 1.

⁴ Co. Lit. 53 b. Dyer, 37 a. Gunning v. Gunning, 2 Show. 8. 1 Swift, 517-8. 2 Bos. & P. 86. Worsley v. Stewart, 4 Bro. Parl. Ca. 377.

⁵ Jackson v. Andrew, 18 John. 431.

⁶ Co. Lit. 53 a.

⁷ Co. Lit. 53 a. 54 b. Loomis v. Wilbur, 5 Mas. 13.

point a receiver for that purpose ; for this would be productive of harassing suits and expensive depositions.¹

28. If a tenant covenants to repair, and does not, waste will not lie.²

29. It has been held in South Carolina, that a tenant for life is liable for one-fourth the expense of repairs, to be estimated by commissioners.³

30. For waste caused by act of God, or enemies, the tenant is not in general responsible ; as where a house falls by a tempest. But if merely unroofed, he is bound to recover it before the timbers rot.⁴

31. Where the bank of a river, or a wall of the sea, is destroyed by a sudden flood, the tenant is not liable. Otherwise, where the current is so moderate that he might by due diligence preserve the bank, or where the injury happens by the ordinary flowing and reflowing of the tide.⁵

32. It seems, waste may be of so small value, as not to be a proper subject of legal inquisition. But Lord Coke says, trees to the value of three shillings and four pence hath been adjudged waste, and many things together may make waste to a value. It is said, it ought to be to the value of 40*d* at least.⁶

33. Where the lessee of a meadow, containing three lots, ploughed it into a garden, and built upon it, and a verdict was rendered against him for three farthings damage, one farthing for each lot ; judgment was given for the defendant.⁷

34. With respect to the persons who are liable for the commission of waste, there seems to be no little confusion in the books. Lord Coke says, that at common law a tenant for life was not *prohibited* from waste, unless expressly restrained from committing it. Mr. Cruise limits this remark to the case where lands were *granted* to a person for life, and assigns as the reason, that the grantor had power to impose such terms as he thought proper. Chancellor Kent says, that at common law, a *prohibition* against waste would lie only against a tenant holding *by act of law*. It is said, the register contains five several writs of waste ; two at the common law, for waste done by a dowress or a guardian ; and three by statute, for waste done by tenant for life, for years, and by the curtesy. But it is added, *some have thought* that, at common law, waste did not lie against tenant by the curtesy. In Connecticut, it is held that, at common law, waste would lie only against a dowress, guardian, or tenant by the curtesy. But Lord Coke says, waste does not lie against a *guardian* in socage.⁸

¹ Wood v. Gaynon, Amb. 395.

² Smith v. Poyas, 2 Des. 65.

³ Co. Lit. b. Dyer, 33 a. Moo. 69.

⁴ Co. Lit. a. 1b. n. 10.

⁵ 1 Cruise, 123. 4 Kent, 77, 79, 81.

1 Bos. & P. 120-1.

⁶ Co. Lit. 54 b. n. 1.

⁷ 2 Rolle's Abr. 820. Co. Lit. 53 a.

⁸ 2 Bos. & P. 86.

Co. Lit. 54 a. and n. 11. 1 Swift, 519.

35. Two early English statutes made provision for the punishment of waste committed *by any tenants* for life or for years. Statute of Marlbridge, 52 Hen. III., c. 24, authorized the action of waste, and gave full damages; and the statute of Gloucester, 6 Edw. I., c. 5, extended the penalty to a forfeiture of the place wasted, and treble damages.¹

36. Ecclesiastical persons, bishops, parsons, &c. seised of lands *jure ecclesie*, although having a fee simple qualified, are placed, in respect to waste, under the restrictions of tenants for life. They may cut timber or dig stone for repairs of the church or parsonage, or sell them to raise money for this purpose; but for any thing beyond this they are liable, in England, to a writ of prohibition, or ecclesiastical censure, or injunction in Chancery, and to the last named process in the United States.²

37. So also an injunction lies against the widow of a deceased rector; and an action on the case against one who has resigned, or the representatives of one deceased, by the successor, for dilapidations, or even a neglect to repair.³

38. In Maryland, if a rector commit waste, he forfeits treble damages to the vestry.⁴

39. Chancellor Kent observes, that the provisions of the Statute of Gloucester may be considered as imported by our ancestors, with the whole body of the common and statute law then existing, and applicable to our local circumstances. It has been expressly re-enacted in New Jersey, New York* and Virginia, and adopted in North Carolina, Pennsylvania, Maryland and Massachusetts. In Pennsylvania, a recent statute provides, that the tenant, in case of permissive waste, shall, before decree of forfeiture, be directed to repair, in default of which he forfeits, with treble damages.⁵

40. In Ohio, a tenant in dower, for voluntary or permissive waste, forfeits the place wasted, but the statute does not give treble damages. Tenant by the curtesy does not forfeit.⁶

41. In Massachusetts, by the Revised Statutes, the penalty is forfeiture, with damages.⁷

¹ 3 Bl. Com. 14.

² 11 Rep. 49 a. *Stockman v. Whither*, Rolle's Rep. 86. *Ackland v. Atwell*, 2 Rolle's Abr. 813. *Strachy v. Francis*, 2 Atk. 217. (But see 1 B. & P. 105).

³ *Hoskins v. Featherstone*, 2 Bro. R. 552. *Jones v. Hill*, Carth. 224. 3 Lev. 268. *Radcliffe v. D'Oyly*, 2 T. R. 630.

⁴ 2 Maryl. L. 426.

⁵ 4 Kent, 80-1. 1 N. J. R. C. 209. 1 Vir. R. C. 277. 1 N. C. Rev. St. 609. *Cam. and N.* 26. 4 Mass. 563. 4 Har. & J. 391. *Padelford v. Padelford*, 7 Pick. 152. *Sackett v. Sackett*, 8, 309.

⁶ 2 Chase's Statutes, 1316. *Walk. Intro.* 326, 329.

⁷ Mass. Rev. St. 639.

* Kent says, the *writ of waste*, as a real action, is there essentially abolished; but an *action of waste* substituted, with the same penalty. 4 Kent, 81, n. a.

42. In Rhode Island, the action of waste is still in use for recovery of the freehold wasted.¹

43. In Indiana,² a widow forfeits the place wasted to the immediate reversioner or remainderman. But, for *negligent* waste, she is merely liable in damages. A statute requires her to keep the estate in repair. In New Hampshire and Vermont,³ a widow is made liable to an action for strip or waste done or suffered.

44. In Illinois,⁴ she forfeits to the immediate reversioner, having a freehold or inheritance, where she wantonly or designedly commits or suffers waste. But, for negligent or inadvertent waste, the claim is for damages only. In both cases, the remedy is an action of waste. If she marry again, the husband is liable with her for waste done by her before, or by him after marriage.

45. In Connecticut, there is no statute against waste by a tenant for years, and it is said few actions of waste are brought. A tenant for life, holding *by act of party*, may commit waste or authorize another to do it without incurring any liability. The Statutes of Marlbridge and of Gloucester are not in force; but the provisions of the former are adopted as to tenants in dower and by the curtesy, upon the ground of general reasonableness.⁵

46. In Kentucky,⁶ the Statute of Marlbridge is in terms re-enacted—"farmers shall not make waste, nor sale, nor exile of house, woods and men," &c. without license. For such waste, they shall yield *full damages*, and be punished by *amercement grievously*. But a subsequent chapter of the Revised Laws provides an action of waste, forfeiture, and treble damages, according to the Statute of Gloucester.

47. Only the immediate reversioner in fee of an estate for life can maintain an action of waste. Hence, during the continuance of an intermediate life-estate between such reversioner and the party who commits waste, the latter is not liable, and, if he die before the intermediate tenant, the action is forever gone. In New York, this rule has been changed by statute; but the reversioner recovers without prejudice to the intervening estate. In North Carolina, an action lies at the instance of him *in whom the right is*, against all tenants committing the waste.⁷

48. Tenant for life is liable to an action, for waste committed by him, though he have since assigned his estate.⁸

49. Lord Coke says, that an heir cannot have an action of waste.

¹ Loomis v. Wilbur, 5 Mas. 13.

² Ind. Rev. L. 210-11.

³ 1 Verm. L. 159. N. H. L. 189.

⁴ Illin. Rev. L. 237, 625.

⁵ 1 Swift, 89, 519. Moore v. Ellsworth, 3 Conn. 487. Crocker v. Fox, 1 Root, 323. Rose v. Hays, Ib. 244.

⁶ 2 Ky. Rev. L. 1530.

⁷ Co. Lit. 53 b. 218 b, n. 2. Paget's case, 5 Rep. 76 b. Bray v. Tracy, Cro. Jac. 688. 1 N. Y. Rev. St. 750. 1 N. C. do. 609.

⁸ 1 Cruise, 90.

for waste done in the life of his ancestor, nor a parson, &c. in the time of the predecessor. So if tenant for years, having committed waste, die, an action of waste does not lie against the executor, &c. But in Virginia, Kentucky, North Carolina, New Jersey, New York and Massachusetts, statutes provide that the heir may sue for waste done in the time of his ancestor. And, in Massachusetts, an action for waste survives against executors, &c.

50. In order to sustain the action of waste, the reversion must continue in the same state as when the waste was done; for if the reversioner grant it away, or lease it for years, unless it be "in futuro," the waste is dispunishable, even though he take the whole estate back again. The same effect is produced, though he grant the reversion to the use of himself and his wife, and of his heirs. The action of waste *consists in privity*.¹

51. If tenant in dower and by the curtesy assign their estate and waste be done by the assignee, the heir may have an action of waste against the former, and recover the land from the latter. In New York it is provided, that the action may be brought against the assignee. And if the heir have also assigned, the action lies against the former assignee, because the privity is destroyed. In other cases, the action shall be brought against him who did the waste, for it is in nature of a trespass.²

52. If a tenant after assignment continue to take the profits, he is liable.³

53. Lord Coke says, a wife holding an estate by survivorship shall be punished for waste done by the husband in his life, if she agree to the estate, though there hath been variety of opinions in our books.⁴

54. But an action of waste does not lie against the husband of a woman tenant for life, after her death—the former having committed waste during her life; for he was seised only in her right, and she was tenant of the freehold. Otherwise, if she was tenant for years, because the term vested in him.

55. If tenant for life assign on condition, and the grantee do waste, and the former re-enter for condition broken; the action of waste lies against the grantee, and the place shall be recovered.⁵

56. Although the statute of Marlbridge prohibits only *farmers* from committing waste, yet a tenant is responsible for the waste by whomsoever done, the law regarding him as having power to prevent it, while the landlord has no such power, not being on the land. The reversioner looks to the tenant, and he has a claim over in trespass against the wrong-doer himself. Only the act of God, of the public

¹ Co. Lit. 53 b, 54 a. Mass. Rev. St. 630. 1 Vir. Rev. C. 277. 2 Ky. Rev. L. 1531. 1 N. C. B. St. 610. 1 N. J. R. C. 209. 2 N. Y. R. S. 334.

² Co. Lit. 54 a. Bates v. Shraeder, 13 John. 260. 2 N. Y. R. S. 334.

³ Co. Lit. 54 a. 1 Vir. R. C. 277. 1 N. J. do. 209-10. 2 Ky. R. L. 1530-1. 1 N. C. Rev. St. 609.

⁴ Co. Lit. 54 a.

⁵ Ib.

enemy, or of the lessor himself, will excuse the lessee. He is like a common carrier.¹

57. Lord Coke says, even an infant, and baron and feme, shall be punished for waste done by a stranger. But although the reversioner *may* hold the tenant liable for waste done by a stranger, he may also at his election bring an action on the case against such stranger, for any injury in its nature permanent—as, for instance, digging up the soil. The action of waste lies against a lessee only.²

58. The action of estrepement or waste is now in great degree superseded by an action *on the case* in nature of waste; which has the advantage of being maintainable by any other reversioner, as well as the owner in fee. The Revised Statutes of Massachusetts provide this remedy at the election of the party injured.³

59. It is said that, except under special circumstances, there is no remedy for *permissive* waste; after the tenant's death, either in law or Equity. It has also been held, that the action on the case would not lie for permissive waste. But this decision has been doubted.⁴

60. Chancery will interpose, *by injunction*, to prevent waste upon application of the owner in fee, notwithstanding there is an intermediate reversion. So also, upon application of a remainderman for life, though there are intermediate limitations in tail, and to trustees to preserve contingent remainders; because, although the plaintiff, even when his estate vested, would have no interest in the timber, yet he would have the benefit of the mast and shade.

61. So an injunction lies by the landlord against a sub-tenant, of in favor of an unborn child.⁵

62. Chancery will interpose to prevent waste “pendente lite,” before any act committed, if a party manifests his intention and asserts a right to commit waste.*

63. The Chancery remedy is limited to cases, in which the title is clear and undisputed.⁶

64. In Rhode Island,⁷ a writ of *estrepement*, being in the nature of an injunction, it seems, may be issued by the Court or a judge, after notice to the adverse party and the giving of a bond by the applicant.

¹ 1 Cruise, 124. 4 Kent, 77. *White v. Wagner*, 4 Har. & J. 373.

² Co. Lit. 54 a. *Ross v. Gill*, 4 Call, 252. *Randall v. Cleveland*, 6 Conn. 328. (See *Wilford v. Rose*, 2 Root, 20.)

³ 1 Cruise, 124. 4 Kent, 81. (See 6 Conn. 328.) Mass. Rev. St. 630.

⁴ *Turner v. Buck*, 22 Vin. 523. 4 Kent, 78.

⁵ 1 Rolle Abr. 377, pl. 13. *Moor*, 554. 1 Hov. on Frauds, 226, ch. 7. *Perrot v. Perrot*, 3 Atk. 94. *Worsley v. Stewart*, 4 Bro. Parl. Ca. 377.

⁶ 2 Atk. 182. 1 John. Cha. 11. 2 Dep. 66. *Storm v. Mann*, 4 John. Cha. 21.

⁷ Stat. of R. I. 1836, p. 910.

* In Virginia and Kentucky, if a tenant commit waste after a suit commenced against him, the sheriff shall keep the land. In Maine and Massachusetts, such tenant forfeits treble damages. In New Jersey, the Court will not grant rules to stay waste, in an action of trespass *qu. claus.* (1 Vir. R. C. 277. 1 Smith's St. 138. *Leeds v. Doughty*, 6 Halst. 193. Mass. Rev. St. 630. 2 Ky. R. L. 1531.) Similar provisions in New York. 2 Rev. St. 336.

65. In Maryland,¹ provision is made by statute for the interference of Chancery in case of waste.

66. In New Jersey,² a statute provides for a writ of waste out of Chancery, against a tenant for life or other term. The judgment is forfeiture and treble damages.

67. In Massachusetts, Equity jurisdiction of waste is given to the Supreme Court; and they may stay waste by an injunction. The same process is provided against an owner of land who commits, or threatens or prepares to commit, waste, after the land has been attached.³

68. Although an owner in fee cannot sue for waste if there is an intermediate estate, yet, where timber is cut down by the tenant, the property in it vests immediately in the owner of the inheritance at that time, and he may seize or maintain trover for it, or compel an account of its proceeds, if sold. The tenant has an interest in the timber while it remains standing—it is a part of the inheritance; but this interest is immediately forfeited by the wrongful act of severing it.⁴

69. Land was conveyed to the use of A for life, remainder to the use of his first and other sons in tail; remainder to B for life, with like remainder to his sons. B has a son, living A, who had none, and A severs timber from the land. Held, the son of B should have trover for the timber, although he could not have waste on account of the intermediate estates; and the chance of A's having a son, who would take the inheritance before the son of B, was a mere possibility, liable to be defeated by a feoffment of A, and which did not interfere with this action.⁵

70. Where there are intermediate limitations of the kind above-mentioned, and the immediate owner of the fee brings a bill in Chancery for an account of timber cut down and sold; the Court will not turn the plaintiff round to an action at law, the case being one which peculiarly calls for a discovery; nor will it order the money, paid into Court, to be put out for the benefit of unborn heirs, who may afterwards have a title paramount to that of the plaintiff.⁶

71. The same rule applies, where the timber is severed by accident; as, for instance, by a storm.⁷

72. But where there are trustees to preserve contingent remainders, Chancery will not allow a severance of the timber by collusion between the tenant and the immediate owner in fee, to the injury of unborn heirs.⁸

¹ 1 Md. L. 599.

² 1 N. J. R. C. 209.

³ Mass. Rev. St. 631-2.

⁴ Mores v. Wait, 3 Wend. 104. Bulkley v. Dolbeare, 7 Conn. 232. 3 P. Wms. 267.

⁵ Uvedale v. Uvedale, 2 Rolle's Abr. 119.

⁶ Whitfield v. Bewitt, 2 P. Wms. 240. 1 Bro. Rep. 194, 3, 37.

⁷ Newcastle v. Vane, 2 P. Wms. 241.

⁸ 1 Cruise, 123.

73. Nor will it allow a tenant for life, who also has the first vested estate of inheritance, to take advantage of his own wrong in committing waste, to the prejudice of intermediate contingent remainders, although at law he would undoubtedly have power to do it.

74. A was tenant for life, remainder to his first and other sons in tail, remainder to B for life, with like remainder to her sons, estates to trustees to preserve, &c., remainder to A in fee. A had no son; B had one, who died very young. A commits waste; after which, B has another son. Held, A could not have the timber cut down, nor the administrator of B's son deceased, because he was dead at the time the waste was done; nor the other son of B, because his estate was liable to be defeated by A's having a son;* and therefore that the money received for the timber should be paid into court.¹

75. This having been done, upon the subsequent death of A, and a hearing of the respective parties who claimed the money, viz. the administrator of B's son, B's second son, and the executor of A; held, that inasmuch as the settlement had been wrongfully disturbed by A, the money should be restored to the same course which it would have followed had no such act been done; that B should have an interest for life, remainders in tail, and a reversion in A, according to the settlement.²

76. A Court of Chancery sometimes orders the cutting down of timber upon land held by a tenant for life, for the purpose of paying debts and legacies charged upon the inheritance.

77. Devise to the testator's wife for life, remainder to A in fee, on condition of his paying legacies at certain appointed times; in default of which payment, remainder over. A filed a bill in Equity, averring his desire to cut timber for payment of the legacies, and that the widow and the subsequent remainderman connived to prevent him, in order that his estate might be forfeited by breach of condition, although he offered indemnity for any damage. The Court allowed the prayer, upon his making satisfaction for breaking the ground, &c., and referred it to the Master to determine how much was needed for the object, and which part of the timber could best be spared.³

78. So also, where timber is decaying, a Court of Chancery will order it to be cut, for the benefit of a remainderman in tail, or a remainderman for life, without impeachment of waste—especially if such remainderman represents himself as in necessitous circumstances. And the proceeds shall be paid over to him, and no part of them to the tenant. But enough timber must be left for repairs and *botes*, all

¹ Williams v. Duke of Bolton, 3 P. Wms 268.

² Powlett v. Duchess of Bolton, 3 Ves. jun. 374. 1 Cox, 72. (Dare v. Hopkins, 2 Cox, 110.)

³ Claxton v. Claxton, 2 Ver. 152.

* A better reason seems to have been, that he was born after the waste was committed.

damages compensated, and the act done under direction of the Master. And the right shall not extend to trees, standing for defence and shelter of the house, or for ornament.¹

79. In Maine, any person, seised of a freehold, or of a reversion in fee or in tail, in wood-land, may petition the Court to have the wood cut and sold, and the proceeds invested for the benefit of parties interested. If the property is likely to deteriorate, the Court shall grant such petition, and appoint trustees for the management of the business.²

80. Leases for life, from very ancient times, have usually contained the clause "*absque impetitione vasti*"—*without impeachment of waste*. And it seems to be now settled, that such clause not only authorizes the tenant to cut timber without incurring the statutory penalty, but vests the property of it in him when cut or blown down. So also it entitles him to the materials of a *building* blown down. In other words it gives him, in this respect, the rights of an owner in fee. But if the timber is cut by a stranger, it belongs to the reversioner.

81. The words "*without impeachment of any action of waste*" would merely exempt him from liability to suit. The phrase "*with full liberty to commit waste*" is sometimes used. And *voluntary waste* is often expressly excepted, in which case it has been held, that wilful waste is not excused. It has been suggested of late, that the exception applies only to houses and not to timber; but a late case has decided, that where decaying timber is cut down by order of Court, this clause entitles the tenant only to the interest of the purchase money. So, where there is a remainderman for life without impeachment of waste, timber cut during a prior estate vests not in him, but in the owner of the fee.³

82 A lessee for years, holding under tenant for life without impeachment of waste, may lawfully commit waste. But the tenant for life cannot transfer his power, so that it may be exercised after his own death; nor, where his estate is in remainder, subject to a prior life-estate, without the power, will any agreement between the two tenants for life be sustained, for committing waste before the former estate terminates.⁴

83. A tenant for life, without impeachment of waste, is not permitted to commit malicious waste to the destruction of the estate. This is sometimes called *equitable waste*; and a Court of Chancery will not only prevent it by injunction, but compel restitution after it is committed.

¹ *Aspinwall v. Leigh*, 2 Vern. 218. *Bewick v. Whitfield*, 3 P. Wms. 267.

² 1 Smith's St. 134.

³ 4 Kent, 77. Co. Lit. 220 a. 11 Rep. 82 b. *Bulkley v. Dolbeare*, 7 Conn. 232. *Pyne v. Dor*, 1 T. R. 55. 1 Ves. 265. 1 Cruise, 131. *Wickham v. Wickham*, 19 Ves. 419. *Pigot v. Bullock*, 1 Ves. jun. 479.

⁴ *Bray v. Tracy*, W. Jones, 51. 1 Cruise, 133. 3 Atk. 210, 756.

84. A, upon the marriage of his son, settled an estate upon himself for life, without impeachment of waste, remainder to the son for life, &c. Afterwards, having taken a dislike to his son, A caused the house to be injured, by tearing off fixtures of various kinds, to the value of £3,000. The Court ordered an injunction, and also that the damage be repaired.¹

85. Chancery will also restrain such tenant from cutting down timber, serving for shelter or ornament to a mansion house, or not fit to be felled—such as young saplings, or trees standing in lines, avenues, or ridings in the park, whether planted or natural.

86. But if such waste has been actually committed, Chancery will not decree satisfaction for it to the remainderman.²

87. The clause “without impeachment of waste,” does not justify what the law terms *double waste*.³ Therefore where an estate for life with this right is devised to be sold, the proceeds to be invested in other land to be settled in the same way; the tenant cannot commit waste on the former, because he may do it upon the latter, and this would be double waste.³

88. Where a limited power to commit waste is annexed to an estate for life, the tenant will be restrained from exceeding such power, but it will be liberally construed.

89. Devise to one for life, with power to cut down such trees as four persons named should allow. These persons having died, held, the power remained, and the Court of Chancery would regulate its exercise, and refer to the Master the question what trees could properly be cut.⁴

90. A, having by will devised land to his wife for life, made this codicil—“whereas by my will my wife cannot cut any timber—now, during widowhood, she may cut timber for her own use and benefit at seasonable times,” &c. Held, the wife was not restricted to the cutting of timber for her own use or for estovers, but might cut any kind of timber, though not saplings or sticks fit only for paling.⁵

91. In most of the States, special provision is made by statute against wanton injuries to land, buildings, trees, &c. by persons without title; and, more particularly in the Western States, against the act of firing woods and prairies, belonging either to the party himself, or to another.

¹ Vane v. Ld. Barnard, 2 Vern. 738.

² Downshire v. Sandys, 6 Ves. 108. Packington v. Packington, 3 Atk. 215. Aston v. Aston, 1 Ves. 264. O'Brien v. O'Brien, Amb. 107. Tamworth v. Ferrers, 6 Ves. 419. Day v. Merry, 16 Ves. 375. Roit v. Somerville, 2 Abr. Eq. 759.

³ Plymouth v. Archer, 1 Bro. R. 159. Burges v. Lamb, 16 Ves. 174.

⁴ Hewitt v. Hewitt, Amb. 508. 2 Eden, 332.

⁵ Chamberlyne v. Dummer, 1 Bro. R. 166. 3, 549.

^{*} This phrase is sometimes used in a different sense, p. 172.

CHAPTER XIX.

ESTATE AT WILL AND AT SUFFERANCE.

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| 1. Estate at will—definition.
2. Incidents.
3. Estate from year to year—notice to quit.
9. Annual rent.
10. Mere occupancy.
11. Distinctions between estates at will and from year to year. | 13. How terminated.
21. Suit, whether by lessor or lessee.
22. Summary process against tenants in the United States.
26. English and American Statutes of Frauds and other Statutes.
32. <i>Quasi</i> estate at will.
33. Tenancy at sufferance. |
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1. An estate at will, is where one man lets land to another, to hold at the will of the lessor.¹

2. At common law, such estate was at the will of both parties, but neither could determine it wantonly and to the injury of the other. Thus the lessee was entitled to emblements, notwithstanding a determination by the lessor, though not after a determination by himself; and the lessor, to rent, though the lessee quit before rent-day. A tenant at will is also entitled to estovers. And the manure made upon the land belongs to him, and may be taken by his creditors.²

3. Estates at will, in the strict sense, have become almost extinguished under the operation of judicial decisions. At first, a lease for no certain time, reserving an annual rent, was construed a lease for a year. By the modern doctrine, such estates are construed into tenancies *from year to year*, unless there is an express grant or agreement to the contrary. A tenant from year to year is entitled to six months' notice to quit, and the landlord to the same, unless there is some agreement or custom to the contrary. The notice must end at the end of the year.³

4. But the rule of a half year's notice is not an inflexible one. Justice and good sense require, that the time of notice should vary with the nature of the contract, and the character of the estate. Hence, where lodgings are hired for instance by the month, the time of notice is proportionably reduced. And where a lessor had previously brought a suit for rent against the tenant, charging him by the month, and prevailed; this was held to be evidence of an understanding that he held by the month, and to regulate the time of notice.⁴

¹ 4 Kent, 109.

² 10 Pick. 209-10. 4 Kent, 109-10. *Staples v. Emery*, 7 Greenl. 201.

³ 1 Pick. 46. 4 Kent, 110-11.

⁴ 4 Kent, 111-12. *Coffin v. Lunt*, 2 Pick. 70.

5. The English rule of a tenancy from year to year is in force in New York ; but in other parts of the United States, it is said, the rule has been departed from.¹ In Indiana, it has been held, that a tenant from year to year shall have six months' notice. But the revised laws provide that there shall be only three months' notice, immediately preceding the end of the year.²

6. In Massachusetts, it was at first held, that a tenant at will was not entitled to six months' notice, but only to reasonable notice. The point was afterwards left doubtful whether he could claim any notice ; but reasonable notice was finally held necessary.³ In the case of *Ellis v. Paige*, it was held, that though the tenancy was determined by the will of the lessor without notice, yet the lessee still should have a reasonable time to remove his family and effects.⁴

7. In Maine, the Statute of Frauds is construed to make a parol lease strictly a tenancy at will.⁵

8. In Pennsylvania, it seems, if tenant at will occupy more than a year, he becomes a tenant from year to year, and is entitled to three months' notice.⁶

9. The reservation of an annual rent is the leading circumstance, that turns leases for uncertain terms into leases from year to year.⁷

10. One placed on the land without any terms prescribed or rent reserved, and as a mere occupier, is strictly a tenant at will.⁸

11. Tenant at will cannot assign, though he may take a release ; but a tenant from year to year may assign. In New York, estates at will and at sufferance are declared to be *chattel interests*, but not liable to be taken in execution.⁹

12. Tenancy at will seems still to retain its original character, except for the purpose of notice,¹⁰ and with regard to this it will be seen, (*infra* s. 22), that in many of the States specific statutory provisions have established a definite rule, which leaves no room for construction or uncertainty.

13. As to the methods of *terminating* an estate at will, this may be done either by the lessor or the lessee. The former may determine the tenancy, 1. By an express declaration to that effect, either made on the land, or of which the lessee has notice. 2. By any act of ownership, inconsistent with the tenancy, such as entering and cutting wood, or making another immediate conveyance. But in the latter case, the lessee becomes tenant at will or at sufferance to the land-

¹ 4 Kent, 111.

² *Jackson v. Hughes*, 1 Blac. 427. Ind. Rev. L. 518.

³ 4 Kent, 211. 17 Mass. 287. 2 Pick. 70. Ib. 71 n.

⁴ 1 Pick. 49.

⁵ *M'Dowell v. Simpson*, 3 Watts, 129.

⁶ 4 Kent, 112.

⁷ Ib. 1 N. Y. Rev. St 722.

⁸ Ib.

⁹ Ib.

lord's grantee, who cannot treat him as a trespasser before entry or notice to quit.¹

14. But where A conveys to B, and B to C, and A remains in possession, C may have ejectment against him without notice, though B has received rent since the conveyance to C.²

15. On the other hand, the lessee may determine an estate at will, by any act of desertion, or any act inconsistent with the tenancy—as by assigning, or committing waste. If he assign, or make a lease, this amounts to a disseisin of the lessor at his election; but it is held that the assignor and not the assignee is the disseisor, though the landlord may sue the assignee in trespass. And by committing waste the lessee becomes a trespasser—it being a determination of his estate. The action of *waste* does not lie against him. Nor is he liable in any form for mere permissive waste.³ In Indiana,⁴ a statute provides that, in case of waste, a tenant shall not be entitled to notice.

16. A tenant at will mortgages in fee, and the mortgagee enters under a judgment upon the mortgage. The lessor may have trespass against the latter.⁵

17. A conveys land to B, but continues to occupy as tenant at will to B. C, a creditor of A, levies an execution upon the land, himself enters, and A points out what part of the land he wishes to have levied upon, assists the surveyor, and gives no notice of B's title. Held, these facts constituted a determination of A's tenancy, so that B might maintain trespass against C.⁶

18. The death of either landlord or tenant, terminates an estate at will.⁷

19. A distinction is made between a termination of the estate *by notice*, and a termination in other modes without notice. In the former case, the tenant, it seems, becomes a trespasser by holding over, but not in the latter—as, for instance, by the death of the landlord, of which the tenant is not notified.⁸

20. Where a parol letting is made for a particular object, the lessee's estate will not extend beyond the time necessary for this purpose. Hence, if the tenant is put upon the land to raise a crop, and absconds before the crop is completed, this determines his estate.⁹

21. For any injury to the land which affects merely the interest of

¹ 1 Cruise, 190-1. Keay v. Goodwin, 16 Mass. 1. Rising v. Stannard, 17, 288. 1 Pick. 47.

² Jackson v. Aldrich, 13 John. 106.

³ 4 Verm. 291. 1 Cruise, 191. Chandler v. Thurston, 10 Pick. 209. Co. Lit. 57 a. Blunden v. Baugh, Cro. Car. 302. Lit. s. 71. 5 Rep. 13 b. Treat v. Peck, 5 Conn. 280.

⁴ Ind. Rev. L. 520.

⁵ Little v. Palister, 4 Greenl. 209.

⁶ Campbell v. Procter, 6 Greenl. 12.

⁷ 17 Mass. 284.

⁸ Ib. 287.

⁹ Chandler v. Thurston, 10 Pick. 209.

the tenant, as by treading down the grass and breaking down a fence built by the tenant, the landlord cannot maintain an action.¹

22. In New York, Pennsylvania, Maryland, Indiana, Connecticut, New Hampshire and Massachusetts, a summary process is provided, by which a landlord may regain possession of land held by a tenant at will after notice to quit. In Indiana, the right to emblements is saved. In most of these States, an accompanying provision is made, with regard to the time of notice requisite before commencing the process referred to. In New York and Maryland, one month's notice is required; in Pennsylvania, Delaware and New Hampshire, three months' notice; in Connecticut, thirty days'. In general, if the rent is made payable at shorter intervals than one month, the time of notice is reduced accordingly. Where the rent is unpaid, only seven days' notice is required in New Hampshire, and fourteen in Massachusetts.²

23. In Ohio, it is said, nothing is settled on the subject of notice. In ejectment against a tenant, there must be ten days' notice before commencement of the term to which the appearance is to be made; and in that of forcible detainer, ten days' before suit brought. It is intimated that this is the only notice to quit required. But the notice must expire before or at the time when the period designated ends. If the tenant enters upon a new one, he shall hold till the end of it. The pay-day or rent determines the length of the period.³

24. In South Carolina, where there is a lease or demise in writing for one or more years, or at will, after a determination of the estate and a written demand, the lessor, after ten days, may have a summary process to obtain possession, against either the lessee or his sub-tenant.⁴

25. It is said, that in New York, the statute, providing a summary process against tenants, does not provide for any notice to a tenant from year to year. Hence, he may be turned out without notice. The act does not apply to a tenancy created by operation of law.⁵

26. The resolutions of the Courts, turning estates at will into tenancies from year to year, though founded in equity and sound policy, are said to be a species of *judicial legislation*; and would seem to be opposed by the English Statute of Frauds, which was long subsequent to the introduction of this tenancy, and which declares "all leases, estates or uncertain interests in land, made by parol, to have the force and effect of estates at will only, and not in law or equity to be deemed or taken to have any other or greater force or effect;" excepting, however, leases for not more than three years, on which a rent is reserved, amounting to two thirds of the full improved value. The English

¹ Little v. Palister, 3 Greenl. 6.

² 4 Kent, 113. Ind. Rev. L. 520. Mass. Rev. St. 412, 628. Dela. St. 1829, 285.
³ 1 Swift, 91. N. H. L. 1831, 22-4.

⁴ Walk. Intro. 260.

⁵ 2 Brev. Dig. 16.

⁶ Nichols v. Williams, 8 Cow. 13. Evertson v. Sutton, 5 Wend. 281.

decisions, Chancellor Kent remarks,* have never alluded to this exception, but have moved on broader ground and on general principles, so as to render the exception practically useless.¹ The exception is dropped in the Statute of Frauds of Massachusetts, New York, Maine, New Hampshire and Vermont, but retained in Missouri, Indiana, Georgia, South Carolina, New Jersey, Michigan, and in North Carolina and Pennsylvania (without reference to the amount of rent reserved.²)

27. In Illinois, New York, Alabama, Rhode Island, Tennessee, Virginia,³ and in South Carolina and Missouri,⁴ as the general rule, parol leases for more than one year are void for any longer term. Similar provision is made in Kentucky. But it is there held, and such undoubtedly is the settled general rule, that the statute does not render the lessee a trespasser. The rent reserved may be the measure of compensation for use and occupation, for which an action or a distress will lie. And it is said, one entering under a parol lease for five years, may retain possession against any process known to the law.⁵

28. In Connecticut,⁶ the only statutory provisions are, that no action shall be brought upon a parol contract for the *sale* of lands, &c.; and that no lease shall be valid for more than one year, against any but the lessor and his heirs, unless *written*, &c. and recorded.

29. In Massachusetts, the Court, in one case, founded their strict construction of the Statute of Frauds, differing from that given to the English statute, upon the consideration that the excepting clause contained in the latter is wanting in the former.⁷ But in another, Judge Putnam strongly contends that this is an unauthorized construction. According to him, the Statute of Frauds does not pretend to *describe the incidents* of an estate at will; but only provides that parol leases *shall have the effect* of leases at will—meaning the effect of such leases as construed by judicial decisions. And he urges the adoption of the rule established in these decisions, by weighty considerations of public policy as to agricultural tenants.⁸†

30. In Maryland, it is provided, that no conveyance of an estate *for more than seven years* shall be valid, unless made in writing, sealed, &c. This seems to be the only statute which bears upon the

¹ 1 Pick. 46. 4 Kent, 113-14.

² *Purd. Dig.* 681. 1 *Smith's St.* 288-9. 1 *Vt. L.* 188. *N. H. L.* 1829, 505. *Mass. Rev. St.* 408. 1 *N. J. Rev. C.* 151. *Misso. St.* 284. *Mich. L.* 116-17. *Ind. Rev. L.* 269. *Prince*, 914. 1 *N. C. Rev. St.* 290.

³ 1 *Brev. Dig.* 372. *Illin. Rev. L.* 313. *S. C. St. Mar.* 1817, p. 35. *Aik. Dig.* 207. *R. I. L.* 366. 1 *Vir. Rev. C.* 15. *Tenn. St.* 1801, ch. 25. 5 *Yerg.* 102. 2 *N. Y. Rev. S.* 134.

⁴ *Misso. St.* 117. *Purd. Dig.* 681.

⁵ 1 *Ky. Rev. L.* 734. *Roberts v. Tannel*, 3 *Mon.* 251. *Calvert v. Simpson*, 1 *J. J. Mar.* 548. 1 *Swift*, 260. *Gudgell v. Duvall*, 4 *J. J. Mar.* 230.

⁶ *Con. St.* 262, 360.

⁷ 1 *Pick.* 46.

⁸ 2 *Pick.* 72-5-8 n.

* The Court in Massachusetts, as will be presently seen, (*infra* s. 29), take a different view.

† See *supra* s. 26.

subject of estates at will.¹ In Delaware,² every lease, which specifies no certain term, is for a year, or from year to year, unless the property has been usually let for a less term. A tenancy will not be construed as *purely at will*, "where it can inure or be construed as being from year to year;" but the former requires three months' notice to quit. A lease can be good only for a year, unless made by deed. In case of a demise for one or more years, unless the landlord or tenant give notice to determine three months before the end of the term, it shall be renewed for one year.

31. In Tennessee,³ it has been held, that a parol lease for six years could not be construed into a tenancy from year to year.

32. It is said,⁴ there may be an occupancy *in the nature of a tenancy at will*, which does not constitute precisely that estate. As where one is in possession of land with the owner's privity and consent, but without any express tenancy, or implied acknowledgment of him as a tenant, or implied promise to pay rent. Instances of such occupancy are, where there is a treaty pending between the parties for a purchase or a lease; or a void lease; or, the term having expired, a negotiation for a new one. In these cases, the occupant cannot be ejected without some demand or notice. Where one, whose land has been sold on execution, remains in possession for an uncertain time by consent of the purchaser, he is tenant at will.⁵

33. Tenant *at sufferance* is one that comes into the possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer or transmit, or which is capable of enlargement by release; for he stands in no privity to his landlord, nor is he entitled to notice to quit; and, independent of statute, he is not liable to pay any rent. He is a *wrong-doer*, and holds by the *laches* of the landlord, who may enter and put an end to the tenancy when he pleases, or bring ejectment; but before entry cannot maintain trespass. In Ohio, it is said, though such occupant is not liable to rent, *as such*, he might be liable in an action for use and occupation.⁶

34. In New Jersey it is held,⁷ that if a tenant for a fixed term hold over with the lessor's consent, he becomes a tenant from year to year. This consent may be express or implied; but it can be inferred only from acts; not from mere silence and inaction. Thus, where the lease was for a year, and the tenant held over for two years, held, ejectment would lie against him without notice.

35. So in New York, a tenant for a year, who holds over without

¹ 1 Maryl. L. 126.

² Porter v. Gordon, 5 Yerg. 100.

³ Nichols v. Williams, 8 Cow. 13.

⁴ 4 Kent, 115. 16 Mass. 1, 17, 232. Walk. 230-1. Mayo v. Fletcher, 14 Pick. 525.

⁵ Den v. Adams, 7 Halst. 99.

⁶ Del. St. 1829, 286, 368.

⁷ 1 Swift, 91.

permission of the landlord, is liable to the summary process for obtaining possession, without having received a month's notice to quit. He is not a tenant *at sufferance* within the statute. Although the landlord's assent to his holding over may, it seems, be presumed from mere lapse of time, yet it was held that three months and twelve days was not a sufficient period for this purpose, more especially as the landlord had endeavored to regain possession without suit.¹

36. Tenant at sufferance must be one who came to his estate by *act of party*. If one coming to an estate by *act of law* hold over, he is an intruder, abator or trespasser. So where one occupies land together with the owner, he cannot be a tenant at sufferance; for if there be no agreement between them, the legal possession is in him who has the right; and if there is an agreement, this negatives a *sufferance*.²

37. By St. 4 Geo. II., c. 28, and 11 Geo. II., c. 19, if a tenant hold over after demand and notice in writing to quit, or after he has himself signified his intention to quit; he is liable for double rent. These statutes are re-enacted in New York, Delaware and South Carolina, but not generally adopted in the United States.³ In Illinois and Missouri, if tenant for life or for years hold over after notice from the landlord, he is liable for double the *yearly value*; if after notice by himself of an intention to quit, double the rent reserved. And in Missouri, there shall be no relief in Equity.⁴

38. In New York, if guardians and trustees to infants, or husbands seised "*jure uxoris*," or others having estates determinable upon lives, hold over, they are trespassers, and liable for the full profits. There is a similar provision in England by St. 6 Anne, c. 18.⁵

39. The same process, in general, lies against tenants at sufferance, as against tenants at will. Or the landlord may re-enter, without force.⁶

40. In South Carolina, a statute provides that all written leases and agreements shall terminate at the end of the time specified therein.⁷

¹ Rowan v. Lytle, 11 Wend. 616. ² 4 Kent, 115. Johnson v. Carter, 16 Mass. 446.

³ 4 Kent, 115. Dela. St. 1829, 368. S. C. St. 1808. 1 Bai. 497.

⁴ Illin. Rev. L. 675. Misso. St. 376-7.

⁵ 4 Kent, 115-16.

⁶ Ib. 116.

⁷ S. C. St. Mar. 1817, p. 35.

CHAPTER XX.

USES AND TRUSTS. USES PRIOR TO THE STATUTE OF USES.

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| 1. Origin. | 12. How distinguished from legal estates. |
| 3. Nature and definition of. | 23. Evils and mischiefs of, and statutes to prevent. |
| 7. The three incidents of. | |
| 11. Who might be seised to. | |

1. HAVING treated of legal estates, we come now to consider equitable estates, or *uses and trusts*. At an early period a practice arose in England, of one person's conveying lands to another, with a private agreement that the latter should hold the lands, for the benefit and profit of the feoffor or of a third person. The practice did not become general till the time of Edward III., when it was resorted to by the churchmen to evade the statutes of mortmain, and enable them to receive the rents and profits of lands, which those statutes prohibited them from receiving and holding in their own names. Such a conveyance, made nominally to one person but for the benefit of another, vested the legal estate in the former, and in the latter what the law termed *a use*.

2. A use corresponds to the *fidei-commissum* of the civil law. Under that system, there were many persons, whom the law did not allow to be heirs or legatees. It became customary therefore for a testator, who desired to make provision for such persons, to constitute by will some *capable* person as his heir, adding a request that he would convey the estate to the intended object of his bounty. The latter however had only a *jus precarium*, or a right depending on courtesy and entreaty, and not a strictly legal claim. But after the law had continued in this state for several centuries, the Emperor Augustus first, and afterwards Justinian, introduced regulations which placed the *fidei-commission* upon a legal foundation; the former, by giving jurisdiction of it to the consuls and the prætor (who was thence called *fidei-commissarius*), and the latter, by requiring an heir, supposed to be chargeable with such trust, to take an oath that he was not, or else to execute it.

3. In the early age of uses, the party beneficially interested, called *cestui que use*, like the Roman *hæres fiduciarius*, had no legal, but only a *precarious* right. But at length, to protect the rights of the clergy, who were chiefly interested in trust property, the clerical chancellors assumed jurisdiction of the subject; and, in the reign of Richard II., John Waltham, Bishop of Salisbury and Chancellor, for the first time issued a writ of *subpœna* returnable in Chancery, whereby

the party charged with a trust was compelled to appear and answer upon his oath the allegations made against him. This form of proceeding, being contrary to the spirit of the common law, became very obnoxious; and in successive reigns petitions against it were presented to Parliament, but without success; till, in the reign of Henry VI., it was provided, that no *subpœna* should issue until the party applying for it had given security to pay, if he should fail in the suit, all damages and expenses incurred by the defendant.

4. Lord Bacon, in defining a use, says, "it is no right, title or interest in law"—neither *jus in re* nor *ad rem*, neither an estate nor a demand; but something unknown to the common law, and for which therefore it furnished no remedy.¹

5. He proceeds to say, that a use is "*dominium fiduciarium*," an ownership in trust; and therefore a use, and an estate or possession, differ rather in reference to the forum which takes cognisance of them, than the nature of the thing—one being in court of law, the other in court of conscience.

6. A use was no property at law, because it arose from a mere declaration, and not from livery of seisin, which was absolutely necessary to create a freehold estate. Thus it was very early held, that if A enfeoffed B to the use of himself, A, the feoffor, should have nothing, at law, against his own feoffment. So if the *cestui que use* entered upon the land, the feoffee to use might have an action of trespass against him; while, if the latter entered and ousted the former, he had no remedy at law, but his only redress was in Chancery. The *cestui*, although usually in possession, was a mere tenant at sufferance, and, if he made a lease, the lessee might plead that he had no estate in the land.²

7. Chancery at first interfered in favor of a *cestui que use*, only by compelling the feoffee to pay over the profits to him. But afterwards it proceeded to require, that the feoffee should convey the land to the *cestui* or such person as he should select; and also defend the title against any adverse claimant. Hence it was said, that the three incidents of a use were *pernancy of the profits, execution of estates, and defence of the land*.

8. It was still held, however, that the land was subject to all liabilities and incumbrances in the hands of the feoffee, as if he were the only party interested; as, for instance, to dower and forfeiture. And the *cestui's* right in equity was held to be not *issuing out of* the land, like a rent or right of common, but *collateral to it*; and therefore not chargeable upon the land, into whose hands soever it might pass, but only by reason, and during the continuance, of *confidence in the person and privity of estate*.³

¹ 1 Rep. 140 a.

² 1 Rep. 122 a. Flow. 352. Poph. 71.

³ 4 Edw. IV., 3. 1 Rep. 140 a.

9. *Confidence in the person* at first extended only to the original feoffee; and it was held that even his heir, after his death, was not liable to the use in Chancery, but could only be charged by a bill in Parliament. But as early as the reign of Henry VI., it was settled that the liability extended not only to the original feoffee, but to all who came to the estate in the *per*, either *without consideration or having notice* of the use. Thus an heir of the feoffee was charged with the use. So a purchaser from the feoffee, if he either paid no consideration and had no notice, or if he paid a consideration and had notice.¹

10. The requisition of *privity of estate* demanded, in order to a continuance of the use, that there should be not merely possession of the same land, but a continuance of the same estate in that land, which was held by the original feoffee. Hence, a person holding the land, but not claiming in the *per*, even though he took with notice, was not chargeable; as, for instance, a disseisor, the lord holding by escheat, a tenant by the curtesy, or tenant in dower, all of whom claimed by a title paramount, and not the same estate with the feoffee.²

11. Any person, who was capable of taking lands by feoffment, might also be a feoffee to uses. And even those who were legally disabled to bind themselves, as infants and married women, if enfeoffed to uses, would be compelled in Chancery to execute them; because such persons might inherit from a feoffee, and would then clearly be chargeable, and the execution of the use was deemed to be made *by the feoffor*, through his agent the feoffee. But a corporation could not be seised to uses; not being subject to any compulsory Chancery process, and being supposed, as a matter of course, to hold to its own use.³

12. It was remarked by Lord Bacon, "uses stand upon their own reasons, utterly differing from cases of possession;" and the remark is illustrated by the following rules and principles.⁴

13. A use being recognised only in Chancery, which was governed to a great degree by the rules of the civil law, it was held, conformably to one of those rules, "*ex nudo pacto non oritur actio*,"—that no use could be created without a good or valuable consideration; for otherwise it was *donum gratuitum*. But this principle seems to have been applicable only to such conveyances, as did not carry with them a change of possession, such as a covenant to stand seised or bargain and sale, which were mere *contracts*.⁵

14. In other particulars also, a use was not subject to the rules of the common law. Not being an *estate*, it was exempt from the burdens and incidents of feudal tenure. Thus it was not forfeitable for

¹ Keilw. 42. Bro. Abr. Feoffment al use pl. 10. 1 Rep. 122 b. Gilb. 178-9. 4 Pick. 71.

² 1 Rep. 139 b, 122 a.

³ Bac. Read, 58. 4 Kent, 286. Plow. 102.

⁴ Bac. Law Tracts, 310.

⁵ Bac. Read. 13. 4 Kent, 286.

crimes. For the same reason it was not extendible by process of law ; and being neither a chattel nor hereditament was not assets to the executor or the heir. So there was neither curtesy nor dower in a use ; because the cestui had no legal seisin.¹

15. A use, though held to be a mere right, was still, unlike other *choses in action*, subject to alienation ; because, as no action at law lay to enforce it, the mischiefs of maintenance could not arise from such transfer.²

16. A use might be transferred by any deed or writing, and without livery of seisin, of which from its very nature it was of course not susceptible.

17. Contrary to the rule of the common law, a use might be declared to a person who was no party to the deed which created it.³

18. St. 1 Rich. III. c. 1 empowered a cestui to alienate the legal estate without the consent of the feoffee. This act was passed to prevent feoffees from entering upon the land, after a transfer by the cestuys, which had often previously been done.⁴

19. A use might be limited without those technical words of limitation, which are necessary in a common law conveyance. Thus, a fee simple would pass without the word *heirs*. So, a freehold might be limited to commence in futuro ; or a contingent freehold remainder upon a precedent estate less than freehold, because the freehold estate of the feoffee was sufficient to support such remainder.⁵

20. A use might be so limited as to be *revocable* at the will of the grantor, and give place to such new uses as he should appoint ; or it might be so limited, as to change from the original cestui que use to another person, upon the happening of some future event ; even though the first limitation were in fee, and therefore, in case of a legal estate, would preclude any further disposition. Thus, the limitation might be to A and his heirs till B should pay him such a sum, then to B and his heirs. The reason of this distinction was, that a legal estate, being created by livery, could be defeated only by the corresponding act of entry ; and a charge required a corresponding discharge ; while a use, arising from a mere declaration, was subject to be changed in the same way.⁶

21. A use was devisable, though lands at that time were not ; and this was one reason for the large number of limitations to uses. But the devise of a use by a married woman was, in a very early case, held void, even in Chancery.⁷

¹ Co. Lit. 272 a. 1 Rep. 121, b. Co. Lit. 374 b.

² Bac. Read. 16.

³ Read. 14.

⁴ 1 Cruise, 270.

⁵ 1 Rep. 101 a, 135 a.

⁶ 1 Cruise, 368. Bro. Abr. Feoffment al Use 30. Bac. Read. 18.

⁷ Bac. Read. 20. 1 Rep. 123 b. Mich. 18 Edw. IV.

22. Uses, though differing in most points from legal estates, were subject to the same rules of descent.¹

23. The doctrine of uses, as above described, although productive of some convenience, in enabling persons to convey their lands with less restraint and technicality than they could otherwise do, was found to open a door for very great and serious mischiefs. Creditors were defrauded by secret conveyances; husbands were deprived of curtesy, and wives of dower; and titles became so private, variable, and confused, that it was difficult for a legal claimant of land to determine against whom he should maintain his action. To remedy these and the like evils, several successive statutes were passed, from the reign of Edw. III. to that of Hen. VII., subjecting uses to legal process for the debts of the cestui, and to the feudal incidents and exactions of wardship and relief, where the cestui died without making a will.² These statutes, however, proved ineffectual to remedy the evils complained of. To avoid the feudal burdens consequent upon descent, devises became mischievously frequent. At length, after an unsuccessful attempt four years previously by the king to procure the passage of such a law, the statute of uses—27 Hen. VIII. c. 10—was enacted, with the title of “an act concerning uses and wills.” This act will be considered in the next chapter.

CHAPTER XXI.

USES AND TRUSTS. STATUTE OF USES, CONSTRUCTION AND EFFECT THEREOF.

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| <ol style="list-style-type: none"> 1. Terms of the statute. 2. Adopted in the United States. 3. Instantaneous seisin of trustee. 4. Who may be seised to uses. 7. What estate may be held to uses. 9. There must be a cestui <i>in esse</i>. 10. What estate a cestui may take. 12. Feoffee and cestui must be different persons; construction where they are the same. | <ol style="list-style-type: none"> 14. Exceptions to the rule. 15. There must be a use <i>in esse</i>. 16. <i>Actual seisin</i> vests in cestui. 17. Estate of feoffee will not merge. 20. Limitations to uses, how far subject to common law rules. 22. Implied and resulting uses. |
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1. THE St. 27 Hen. VIII., c. 10, called the Statute of Uses, and referred to at the end of the last chapter, recites, that by the common

¹ Co. Lit. 14 b. Gilb. 17.

² 1 Cruise, 369.

law, lands could not be passed by will, but only by livery of seisin ; but that divers subtle practices had been introduced, in the form of fraudulent conveyances and assurances and of last wills, whereby heirs were disinherited, lords deprived of their dues, husbands and wives of curtesy and dower, and perjuries committed. The statute then proceeds to enact, that where any person was or should be seised of any honors, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any person or body politic ; the latter should have the legal seisin and possession, nominally given to the former, and corresponding to the use, trust and confidence held previously to the statute in lands so limited ; and, where lands were limited to several persons to the use of a part of them, the latter alone should have the seisin and possession.

2. The English statute of uses is almost universally in force in this country. It is substantially re-enacted in Illinois, Missouri, and South Carolina. But in Ohio, it is said not to be in force.¹

3. Since this statute, and conformably to its intent, one person, taking lands to the use of another, gains only an instantaneous seisin, which subjects them to no incumbrances in his hands ; but the legal estate vests immediately in the cestui.²

4. The same persons may be seised to uses now, that could have been so seised before the statute.

5. In England, the king or queen cannot be seised to uses. Thus where a man received a fine of lands to the use of the conusor, after the former had committed treason ; the cestui then conveyed to a third person, and the conusee was afterwards attainted ; it was held by very distinguished lawyers, that the queen (Elizabeth) would hold the lands by forfeiture, clear of the use. The queen however relinquished them to the cestui.³

6. Under the words of the statute, "any person or persons," a corporation cannot be seised to uses, nor an alien. And where lands are conveyed to a citizen and an alien to the use of another, the share of the alien shall be forfeited.⁴

7. Under the word *seised* in the statute, a person may hold any estate of freehold to uses. If the estate is less than a fee simple, the use will continue while the estate lasts, but no longer. Thus it is said to be now settled, though formerly doubted, that a tenant in tail may be seised to uses. If the use is in fee, it is a fee simple determinable upon the death of the tenant in tail without issue. So a tenant for life may be seised to a use, which will terminate at his death.⁵

¹ Illin. Rev. L. 130. Misso. St. 119. 2 Brev. Dig. 313. 3 N. H. 256. Walk. Intro. 310.

² 1 Cruise, 375. 2 Leon. 18.

³ Pim's case, Moo. 196. Co. Lit. 13 a, n. 7.

⁴ Bac. Read. 42, 57. King v. Boys, Dyer, 263.

⁵ Cro. Car. 231. Read. 57. Plow. 557. Co. Lit. 19 b. 1 Cruise, 376. Dyer, 186 a. Crawley's case, 2 And. 130.

8. Under the words of the statute, any kind of real property, whether corporeal or incorporeal, in possession, remainder and reversion, may be conveyed to uses, provided the estate is in the ownership of the grantor at the time of conveyance. And if the estate is a rent, it may be so limited, though created *de novo* by the conveyance.¹

9. A use requires a cestui *in esse*, and cannot therefore take effect, if limited to a person not *in esse* or an uncertain person.²

10. A cestui may take any estate known to the law.³

11. All persons may be *cestuis que use*, who are capable of holding lands at common law. Corporations are expressly named in the statute.

12. In general, the statute of uses is not applicable, unless the feoffee to uses and cestui are different persons. Where the same person is both feoffee and cestui, he will never take by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law. The words of the statute are, "seised to the use of some *other* person."⁴

13. Hence the principle above stated, that the estate of the cestui cannot exceed that of the feoffee, is inapplicable to this case. Thus where a conveyance is made to a man and wife, *habendum* to the use of them and the heirs of their bodies; they take an estate tail, as they would if the words "the use of" had been omitted. It is not a use divided from the estate, but the use and estate go together. It is no limitation of the use, but a limitation of the estate. So a conveyance to one, to hold to him and his heirs, "to the use and behoof" of him and his heirs forever, passes the fee by the common law; the words meaning only "for his and their sole benefit," and indicating in how ample and beneficial a manner the grantee is to take the estate, without return of any service whatever to the grantor. The same construction is given, in case of a conveyance to one and his assigns, *habendum* to him and his assigns, to the only use and behoof of him and his assigns during his life; or a conveyance to A, to hold to him and his heirs, to the only use of them during the lives of B, C and D.⁵

14. But there are other cases of similar character, where a use is executed by the statute, in order to satisfy the parties' intention. Thus, where a conveyance is made to a person and his heirs, to the use of him and the heirs of his body; or where one covenants with another, that he and his heirs will stand seised to the use of himself and the heirs of his body; or to the use of himself for life, remainder over in fee; in each of these cases, the use is executed by the statute according to the limitation.⁶

¹ Cro. Eliz. 401. 22 Vin. 217. Read. 43.

² 1 Cruise, 380.

³ Ib.

⁴ Read. 63.

⁵ Jenkins v. Young, Cro. Car. 230. Dyer, 186 a, n. Meredith v. Jones, Cro. Car. 244. Gilb. Rep. 16-17. 2 Booth's Cas. and Opin. 281. 1 M'Cord's Cha. 233.

⁶ Read. 63. 13 Rep. 56.

15. Finally, there must be a use in *esse*, in possession, remainder or reversion¹

16. It was formerly supposed that the statute of uses, being a mere act of parliament, transferred to the *cestui que use* only a civil seisin or seisin in law. But the well-established doctrine now is, founded upon the words "shall be in lawful seisin, estate and possession to all intents, constructions and purposes in the law;" that the actual possession of the land vests in the *cestui*.²

17. By virtue of a saving clause in the statute, where a feoffee to uses previously had an estate in the same land, such estate shall not be merged or destroyed by the conveyance to uses. It is said, that the intention of that statute was not to destroy prior estates, but to preserve them.³

18. And where land was first leased for years, and afterwards conveyed to the lessee and others in fee, to their use, to the intent that a common recovery should be had against them to the use of a stranger, which was afterwards done; held, although there was a temporary merger till the recovery was suffered, yet, when this took place, it had relation back to the conveyance, and restored the term for years.⁴

19. Upon the same principle, it seems, where the subsequent conveyance to uses, in England, is by *lease and release* (a form not practised in the United States), this lease, although prior to the release, does not merge the old estate for years, although, by accepting it, the lessee admits the lessor's power to make a lease. The lease, being made expressly to enable the lessee to accept a release to uses, shall not be construed as made to his own use; and, if the old estate for years were extinguished, it is revived by the release.⁵

20. The preamble to the statute of uses sets forth an intention to restore the ancient common law, and to extirpate such limitations and conveyances as had grown up under the form of uses, inconsistent therewith. Hence it was at first held, that under that statute, uses must be limited according to the rules of the common law; so that no uses of inheritance could be created, without the same technical expressions required in common law conveyances. In other words, the *estate* in the use, when it became an interest in the land under the statute, became liable to all the rules of common law estates.⁶

21. But, on the other hand, the *qualities*, which had attended uses in Equity, followed them when they became an estate in the land itself. The complex and modified interests annexed to uses were engrafted upon the legal estate. Hence, the same departures from the common law, in regard to the limitation of estates, have been

¹ 1 Rep. 126 a.

² Co. Lit. 266 b. Gilb. Uses, 230.

³ 1 Cruise, 385. Cro. Jac. 643.

⁴ Ferrers v. Fermor, Cro. Jac. 643. 1 Vent. 195. 1 Mod. 107.

⁵ Cook v. Fountain, Bac. Abr. Lease R. ⁶ 1 Rep. 129 b. 1 Rep. 67 b.

allowed since the statute as before. To these reference has already been made; and they will hereafter be more fully considered, under the titles of Remainder, Powers and Devise. It is sufficient to state here, in general, that a fee in a use may be limited upon a fee; that a freehold estate may be made to commence *in futuro*, without any preceding estate to support it; and that the party who creates the uses, may reserve to himself a power of revoking them, and appointing new uses in their place. It is said, that in the two former cases, the uses, being limited to take effect upon the happening of some contingency specified in the deed, come *in esse* by act of God; while in the latter case they arise by the act of man. Both are future or contingent uses till the act is done; and afterwards, by the operation of the statute, actual estates.¹

22. Both before and since the Statute of Uses, if a person convey land without consideration, and without any thing to show a different intent; the conveyance is held to be made to his own use, and not that of the grantee, and such a use is executed by the statute, so that in fact no estate passes from the grantor, but he remains seised as before. The law will not presume that a man intends to give away his estate. Such a use is called a *resulting* use.²

23. It is said, that so much of the use, as the owner of the land does not dispose of, remains in him.³ Thus, in England, if he levy a fine or suffer a recovery, without consideration, and without declaring any uses, the whole estate remains in him as before, whether in possession or reversion; while, if certain uses are declared, he retains all that is left of the old estate after these uses are satisfied. So, if one convey land to the use of such person or persons, and for such estate and estates, as he shall appoint by his will, or to the use of himself and his intended wife after marriage; till such appointment is made, or till such marriage, the use results to him.⁴

24. The use will result, according to the estate which the parties who create or declare it had in the land, being but a trust and confidence, and therefore not subject to technical estoppels and conclusions. Thus, if husband and wife join in a conveyance of her land, the use results to her alone. So in case of joint tenants. So, if a particular tenant and the reversioner join in the deed, each takes back his former respective estate; and, if the former declare uses and not the latter, a use results to the latter alone. And if one having no interest in the land joins the owner in the deed, nothing results to the former.⁵

¹ 4 Kent, 289. *Ib.* 290. 1 Atk. 591. 1 Cruise, 393.

² 11 Mod. 182. Dyer, 146 b.

³ Co. Lit. 23 a. 271 a. Dyer 166 a. *Armstrong v. Wolsey*, 2 Wil. 19.

⁴ Co. Lit. 23 a, 271 a. Dyer, 166 a. *Clere's case*, 6 Rep. 17 b. *Woodliff v. Drury*, Cro. Eliz. 439.

⁵ *Beckwith's case*, 2 Rep. 58 a. Dyer, 146 b. *Davis v. Speed*, Show. Cas. in Parl. 104. *Roe v. Popham*, Doug. 24.

25. If uses are declared, but to take effect from and after the death of the grantor, a use results to him for life.¹

26. A, in consideration of the marriage of B, his son, conveys to the use of B for life, remainder to B's wife for life, remainder to B's first and other sons in tail, remainder to the heirs male of the body of A. Inasmuch as the estates to B, his wife and issue, may terminate before A's death, a use results to him expectant upon such termination.²

27. But, if an intermediate remainder is limited to trustees, in trust to support contingent remainders, but to permit the grantor to receive the rents and profits for life, no use results to him.³

28. Where a use expressly declared is the same which would result to the grantor, the declaration is void, and he takes a resulting use. Thus, where a remainder is limited to the use of his own right heirs, he retains a *reversionary* interest, the limitation being void.⁴

29. Resulting uses arise from those conveyances, which operate by a change of possession; such as a feoffment, or in the United States a grant. Substantially the same principles apply to those conveyances, in which the owner nominally does not part with possession, and of which the only one known in this country, is a covenant to stand seised. In this case, so much of the use as is not expressly disposed of remains in the covenantor, under the name of a use by implication. Thus, where one covenants with another to stand seised to the use of the heirs of his own body by a certain wife, as he can have no heirs while living, a use by implication remains to him for life. So, if no use arises for want of consideration or any other cause, a use by implication arises to the covenantor.⁵

30. No use will result, where any circumstance shows a manifest intent to the contrary. Thus, where a recovery is suffered, or a conveyance is made, to the intent or on condition, that the party receiving the land shall make an estate, limited in a certain way; no use results, because then he would be unable to make an estate, as provided for. But if this is not done in reasonable time, it seems, a use will result.⁶

31. So, where the grantee is to make an estate to such person as the grantor shall name, and it is stipulated that he shall be seised to no other use than the one specified; the grantee holds to his own use till an appointment is made, or, if the grantor dies without making one, to the use of his heirs.

32. As resulting uses depend upon intention, parol evidence is admissible in regard to such intention. The statute of Frauds, requiring

¹ Penhay v. Hurrell, 2 Vern. 370. 2 Free. 258.

² Wills v. Palmer, 1 Cruise, 295.

³ Tiffin v. Coson, 4 Mod. 380. 1 Lord Ray. 33.

⁴ Read v. Errington, Cro. Eliz. 321. Moo. 284. 2 Rep. 91 b.

⁵ Pibus v. Mitford, 1 Vent. 327.

⁶ Hummerston's case, Dyer, 166 a, n. 9. Winnington's case, Jenk. Cent. 6 Ca. 44.

uses to be proved by some writing, is applicable only where *third persons* are beneficially interested.¹

33. No use will result, where an estate is expressly limited to the grantor, with which a resulting estate would be inconsistent.

34. Thus it is said, if a feoffment in fee be made to the use of the feoffor for life or for years, no use results, because the particular estate would merge in the fee, if they were held by one person. Otherwise, if it were an estate tail, and not for life or for years; because that might exist with the fee simple.²

35. So, where one limits an estate to the use of himself for years, remainder to trustees, remainder to his heirs; no estate for life results to him, because the term for years would merge therein.³

36. The doctrine of resulting uses applies only to conveyances in fee simple; not to the creation of lesser estates in tail, for life or for years, though made without consideration or the declaration of any uses. This distinction is founded partly upon usage, but chiefly upon the principle, that the tenure, rent and liability to forfeiture, incident to these lesser estates, constitute of themselves a sufficient legal consideration. The same rule applies, where a tenant for life or for years assigns his estate. And, even though he declares the use of part of the estate, no use results to him for the remainder.⁴

37. A, a tenant for life, conveys to B to the use of B for the life of A and B, and if B died living A, remainder to C. B dies, living A; C enters, leases to D, and dies, living A. Held, there was no resulting use to A, but D should continue to hold as special occupant during A's life.⁵

38. As a devise imports a bounty, it will always be to the use of the devisee, unless a contrary intent is manifest, and no use will result to the heirs of the deviser. But where one is a devisee to uses, which from any cause fail, a use results to the heir.⁶

¹ *Roe v. Popham*, Doug. 25. 11 Mod. 214.

² *Dyer*, 111 b. n. 46.

³ *Adams v. Savage*, 2 Salk. 679. *Rawley v. Holland*, 2 Abr. Eq. 753. 22 Vin. 188, pl. 11.

⁴ Bro. Abr. Feoffment al. Use, pl. 10. *Dyer*, 146 b. Perk. 534-5.

⁵ *Castle v. Dod*, Cro Jac. 200.

⁶ 1 Cruise, 300.

CHAPTER XXII.

TRUSTS. EXPRESS TRUSTS.

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| <ul style="list-style-type: none"> 1. Trusts in general. 3. Trusts in real estate. 4. Uses preferred to. 5. Classifications of trusts 8. How created—use upon a use. 11. Where the uses require a legal estate in the trustee. 12. Intention of parties. 16. Trusts for married women. 24. Limitations with authority to mortgage, &c. | <ul style="list-style-type: none"> 27. Trust ceases when the objects are effected. 32. Or when the cestui alienates. 34. Lands subjected to payment of debts—not necessarily a trust estate. 36. Where the estate is less than freehold—a trust. 37. Express trust, how created—Statute of Frauds, &c.—need not be declared, but only proved, by writing. |
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1. TRUSTS, in general, constitute the most common relation known to the law. It has been said, that a trust exists wherever one person is managing the funds of another. A trust may be defined as an equitable right, title or interest in property, distinct from the legal ownership thereof.¹

2. Where one person is in possession of property which he is bound to deliver to another, and he fails to do so; Equity raises an implied trust, which is subject to the rules and principles of trust estates. Whatsoever is the agreement concerning any subject, real or personal, though in form and construction purely personal and suable at law only, yet in equity it binds the conscience and raises a trust.²

3. A trust, in relation to real estate, is a *use not executed by the Statute of Uses*. Before this statute, a use and a trust were the same thing, and the statute itself uses the words synonymously. But the judicial construction given to this act has rendered it inapplicable to several cases, which will be presently mentioned; and, in such cases, the estate of the party beneficially interested is now termed not a use but a *trust*. It is an estate, for the most part, recognised only by courts of equity, and not by courts of law.³

4. In Massachusetts, before the court had the chancery jurisdiction which it now possesses in relation to trusts, upon principles of public policy, it was held, that the court will, if possible, construe a limitation to be an executed use rather than a trust.⁴

¹ *Hulse v. Wright*, Wright, 61. 2 Story on Equ. 230.

² *Wamburzee v. Kennedy*, 4 Dessaus. 477.

³ 2 Ventr. 312. 16 Pick. 330. 10 John. 494. 2 Ld. Ray. 878.

⁴ 7 Mass. 198. 9, 519. (2 Blackf. 198.)

5. Trusts are either *express* or *implied*. The distinction between these two kinds of trust will be explained hereafter, in considering the somewhat extensive subject of implied and resulting trusts. (See ch. 23).

6. Trusts are further divided into *executed* and *executory*. The former are those "accurately created and defined by the parties," and are construed like legal limitations. Executory trusts are "where something remains to be done to complete the intention of the parties, and their act is not final."¹ Executory trusts are construed liberally. Of this nature are *marriage articles*, which are always construed liberally in favor of the issue, for whose benefit they are chiefly designed. The same principle does not apply to settlements in wills, which are a mere bounty. Equity will not enforce marriage articles in favor of volunteers, or other parties than the wife and issue or their representatives. If enforced for the latter, they will also be enforced in favor of the former.²

7. Lord Hardwicke seems to have rejected the distinction above-mentioned of executed and executory trusts; holding that an executed trust is in fact a use executed by the statute, and that all trusts from their very nature are executory, because they involve an obligation upon the trustee, at some time or other to convey the legal estate to the cestui or for his benefit, whether the party creating the trust expressly so ordered or not. They are to be executed by *subpoena*.³

8. There are three direct modes of creating a trust. The first mode is, by limiting a *use or trust upon a use*. In this case, the latter cestui cannot take an executed use, because the statute requires that the feoffee be seised of *lands or tenements*, which a use is not. Thus a conveyance or devise to A to the use of B, in trust for or to the use of C, gives C a trust, the legal estate being executed in B.⁴

9. So, where there is an appointment to uses, under a power, or a covenant to stand seised with one person to the use of another, the cestui takes only a trust estate.

10. With regard to devises, it has been held, that where there is no necessity for the trustee's taking the legal estate, and the intention is clearly otherwise, the above rule shall not be adopted. And in one case, this principle was extended even to a deed.⁵

11. A second mode of creating a trust, is the limitation of an estate to one for the use of another, in such a way as requires that the former should be in possession on receipt of the profits; as where it is provided, that he shall *take the profits and deliver them* to the cestui,

¹ 2 Story, 246-7, and n. *Jervoise v. Northumberland*, 1 Jac. & Walk. 550.

² 2 Story, 247-250. (See *Bunn v. Winthrop*, 1 John. Cha. 336).

³ *Bagshaw v. Spencer*, 1 Coll. Jurid. 413.

⁴ *Marwood v. Darrill*, Cas. Temp. Hard. 91. *Whetstone v. Bury*, 2 P. Wms. 146. Att'y Gen. v. Scott, For. 138. *Hopkins v. Hopkins*, 1 Atk. 581. *Venables v. Morris*, 7 T. R. 342, 438. *Franciscus v. Reigart*, 4 Watts, 108.

⁵ 1 Cruise, 304, cites *Boteler v. Alington*, 1 Bro. Rep. 72. *Doe v. Hicks*, 7 T. R. 433. *Curtis v. Price*, 12 Ves. 89.

or that he shall *pay over the profits* to him. A provision, that the cestui should *take* the profits, or even that the feoffee should *permit him to receive them*, would make an executed use; because, in order to carry it into effect, the trustee need not be in possession. But in order to *receive* rents and profits for another's use, the trustee must have the legal estate. If this is in the cestui, a mere power in trust to the trustee is of no effect.¹

12. In case of a *devise*, whether the trustee or the cestui shall take the legal estate, will depend upon the intention of the testator as appearing from the circumstances of the case. If the trustee is to do any act requiring a legal estate, it will vest in him, notwithstanding he is to permit the cestui to receive the rents and profits. Thus, where the trustee is to pay annuities, or, after deducting taxes, repairs, and expenses, to pay over the surplus, or to apply the rents and profits to the maintenance and education of a son; the trustee takes a legal estate.²

13. And the same test of *intention* has been applied to a *conveyance*.

14. A conveys land to B, C and D, selectmen of the town of N., habendum to them or their successors, in trust for the use of N. forever; upon the condition, however, that if A shall support himself and indemnify the town against his support, the deed, as also a bond conditioned for such support, to be void. Held, that as the bond belonged to B, C and D, not to the town, and as the deed was merely collateral to the bond, such construction should be given to the former, as would best effect its object, according to the presumed intention of the grantor; and therefore B, C and D took a *trust*, not an executed use.³

15. A, holding a note and mortgage against B, devises them to C, B's son, on condition that he allow B to occupy the land for life, and upon the trust of supporting certain persons named. Held, this was a trust, not an executed use, and that B had no legal life-estate liable to be taken by his creditors.⁴

16. Where a cestui que trust is a married woman, and the provision is made for her separate benefit, clearly and distinctly, the law usually vests the legal estate in the trustee, and gives her only an equitable interest, because this will best effect the object in view.

17. A mother, *in consideration of love and good will* for her daughter, a married woman, conveys land to one "in trust, and for the sole use and benefit" of the daughter during her life. Held, a trust estate.⁵

¹ Bro. Abr. Feoffment al Use, 52. Broughton v. Langley, 2 Ld. Raym. 873. Wood v. Wood, 5 Paige, 114. 2 Pick. 460. 4 Watts, 109. 16 Pick. 330.

² Fearne's Opin. 422. Chapman v. Blissett, For. 145. Shapland v. Smith, 1 Bro. Bro. R. 75. Silvester v. Wilson, 2 T. R. 444.

³ Norton v. Leonard, 12 Pick. 152. 16 Pick. 330.

⁴ Merrill v. Brown, 12 Pick. 216.

⁵ Ayer v. Ayer, 16 Pick. 327.

18. Devise in trust, for the equal use and benefit of the four sisters of the testator, two of whom were *femes covert*, in fee, to be managed as the trustees should think most for the interest of the parties. Held, a trust.¹

19. Devise to trustees and their heirs in trust for a married woman and her heirs; and that the trustees should, from time to time, pay and dispose of the rents to the said married woman, without the intermeddling of her husband. Held, a trust and not an executed use.²

20. Devise of rents to a married woman for life, to be paid by the executors into her own hands without the intermeddling of her husband. Lord Holt held, that the trustees took the legal estate. The other judges thought otherwise.³

21. Devise to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus rents into the proper hands of a married woman, and after her death, that the trustees should stand seised to the use of the heirs of her body. Held, during her life, the trustees took a legal estate; but after her death a use was executed in her heirs.⁴

22. In such cases, it is held, that the trustees take the legal estate by way of an executed use.⁵

23. A testator devised to his grand-children, the children of A, his daughter, all his estate, to be equally divided between them at her death. He also devised the use of the estate for the support of A and her children, during her life; and to carry into effect this provision, he appointed A and B trustees of the estate. Held, a trust estate.⁶

24. A conveyance or devise to trustees and their heirs, in trust to sell or mortgage, to raise money for payment of debts, passes the whole legal estate to the trustees; so that a subsequent limitation in trust gives only an equitable interest to the cestui.

25. Devise to trustees, their heirs and assigns in trust, that they and their heirs should first, by the rents and profits, or by sale or mortgage, raise money for payment of debts; after which, to the trustees, for five hundred years, without impeachment of waste, upon divers trusts. After the termination of this term, devise to the trustees, their heirs and assigns; they to stand seised in trust to uses as follows: for one moiety "I give and devise to the use and behoof of A for life," &c. Held, A took only an equitable, not a legal, interest; because the whole legal estate passed to the trustees, and would have passed even without mention of their heirs, as necessary to the execution of the trust; and no legal remainder could therefore be limited upon it.⁷

¹ *Bass v. Scott*, 2 Leigh, 356.

² *Nevill v. Saunders*, 1 Ver. 415.

³ *South v. Allen*, 5 Mod. 101. *Ib.* 63. 1 Salk. 226.

⁴ *Say v. Jones*, 1 Abr. Eq. 383. 3 Bro. Parl. Cas. 113.

⁵ *Harton v. Harton*, 7 T. R. 652.

⁶ *Donalds v. Plumb*, 8 Conn. 447.

⁷ *Bagshaw v. Spencer*, 1 Coll. Jurid. 378. (*Wright v. Pearson*, Fearn, 126)

26. Conveyance to the use of trustees and their heirs, in trust to sell, and with the proceeds purchase other lands to be settled upon the grantors; with a proviso, that until a sale were made, the rents should be received as before. Held, the use of the estate was executed in the trustees, and that the proviso did not reserve any legal interest or title to the grantors.¹

27. But where the legal estate is vested in a trustee for the accomplishment of particular purposes, it will cease when those purposes have been effected, and a use will be executed in the party who is next beneficially interested. This has been already seen in some of the cases relating to married women.

28. Devise to trustees, in trust from the rents, &c. to pay two life-annuities; after payment thereof, in trust, from the residue of the rents to pay to A a certain sum in trust. After payment of the annuities and said sum, devise to B for life. The trustees were empowered to grant building and other leases. Held, the trustees took the legal estate for the lives of the annuitants, with a term in remainder sufficient to raise the sum mentioned, subject to which B took a legal estate for life.²

29. A conveyance was made in New York, before the Revised Statutes were passed, to A in fee, in trust for her daughter, B, in fee, provided she did not die under age, and without issue; if she did, then for the sole use of A in fee. A dies in the minority of B, leaving B her sole heir. Held, the trust ceased with A's death, and the absolute estate vested in B.³

30. Devise of a certain sum to be for the separate use of A, the daughter of the testator, and the wife of B, for her life, free from the debts of B. B died, and A married a second husband. The trust for the separate use of A ceased with the death of B.⁴

31. Conveyance in trust for the separate use of A for life, remainder, upon her death, to such child or children of A as may be then living, or who shall marry or attain twenty-one years. Held, this created an executed trust, and a vested legal estate, in A's children on her death.⁵

32. Upon a similar principle, a trust estate, created for the benefit of the cestui, may be terminated or converted into a legal estate, in consequence of some act done by such cestui, which vests his interest in third persons.

33. A testator devised property to trustees, to be applied to the support, &c. of A for life, as they should think proper; the application for his benefit to be at their entire direction; and A to have no power in any way to sell, mortgage, or anticipate the rents. A, being insolvent, made an assignment under the insolvent act to B. The Court of Chancery decreed a conveyance of the land to B.⁶

¹ Keen v. Deardon, 8 E. 248.

² Dekay, 4 Paige, 403.

³ Spann v. Jennings, 1 Hill's Cha. 394.

⁴ Doe v. Simpson, 5 E. 162.

⁵ Benson v. Benson, 6 Sim. 126.

⁶ Green v. Spicer, Tam. 396.

34. Where lands are devised in trust, merely subjecting them to payment of debts will not vest a legal estate in the trustee.

35. Devise of real and personal estates to trustees and their heirs; to the intent that they should first apply the personal estate in payment of debts; and as to the real estates, subject to debts, devise to A for life, &c. Held, as there was nothing to show that the trustees were to be active in the payment of debts, although convenience would so suggest, they did not take the legal estate.¹

36. The third case in which the trustee takes the legal and the cestui only an equitable interest, is where the estate limited to the former is *less than a freehold*, and therefore not executed in the cestui by the statute of uses, which makes use of the word *seised*, a word applicable only to freehold estates.²

37. The English Statute of Frauds (29 Cha. II., c. 3, s. 7) requires all creations or declarations of trusts in real estate to be manifested and proved by some writing signed by the party, or by his last will. Parol trusts are contrary to the letter and spirit of the Statute of Frauds, and are calculated to let in all the litigation, uncertainty and mischief which that act intended to prevent.³

38. It is said that this statute did not extend to the Provinces, and was never adopted in the State of Massachusetts.⁴ But a similar provision has been made, it is believed, in nearly every State of the Union.

39. In Ohio, before the Statute of Frauds, passed in 1810, a parol trust was good.

40. In North Carolina, parol declarations of trust are valid.⁵ So also, in some cases, in Pennsylvania. (See p. 208). But the declaration must be made by the grantor of the estate. If made by the nominal grantee, it will be invalid, unless founded on the consideration that the purchase money was paid by the cestui; and in that case it is superfluous, because a trust results by implication.⁶

41. A trust, in order to be valid, need not be *created* by writing; it is sufficient that there is any written evidence of its existence; as, for instance, a letter signed by the trustee, and acknowledging the trust. But such acknowledgment must show not only the existence, but the precise nature and terms of the trust.⁷

42. If the writing be lost, its contents may be proved by parol evidence, as in other cases.⁸

¹ Kenrick v. Beauclerc, 3 B. & P. 175. (Jenifer v. Beard, 4 Har. & McHenry, 73).

² Bac. Read. 42. Dyer, 369 a.

³ Per Sergeant J. 5 Watts, 452.

⁴ Russell v. Lewis, 2 Pick. 508.

⁵ Fleming v. Donahoe, 5 Ham. 256. Foy v. Foy, 2 Hayw. 131.

⁶ Kialer v. Kialer, 2 Watts, 324.

⁷ Forster v. Hale, 3 Ves. jun. 696. Fisher v. Fields, 10 John. 495. 4 Pick. 71.

⁸ Orleans v. Chatham, 2 Pick. 29.

43. A pamphlet published by the trustee was held a sufficient declaration of the trust.¹

44. A written acknowledgment of a trust created by parol, will bind a purchaser from the trustee.²

45. A gives a bond to B to secure an estate to him, and B enters. This is a sufficient creation or declaration of trust.³

46. A conveys land to B, and B gives back an unsealed writing, stating that B had *paid* A a certain sum and taken a deed of the land, and had agreed to let A "have the improvement or sell, provided he should pay said sum in three years and interest." The land was worth more than the sum named. Held, the word *paid* should be construed to mean *lent* or *advanced*; that the effect of the agreement in regard to a sale was, to authorize A to *negotiate* for such sale, and an engagement by B, he having the legal estate, to carry it into effect; and that B held *in trust* for A.⁴

47. A, by a covenant, authorizes B to convey his (A's) land, and retain one third of the money or property received for it, as a compensation for his services. B covenants to pay and deliver to A the other two thirds. Held, a good declaration of trust.⁵

48. *An act of the Legislature* may operate as the creation or declaration of a trust. Thus, the State of North Carolina having made provision in public lands for the revolutionary officers and soldiers—held, an equitable fee simple in the lands thereby vested in the latter, and the State became a trustee with the usual liabilities incident to that office.⁶

49. An admission of a trust by an answer in Chancery is sufficient to bind the trustee.

50. A, in consideration of £80, made an absolute conveyance to B. A brings a bill in Equity to redeem. B, in his answer, insisted that the deed was absolute, but confessed that after payment of the £80 and interest, he was to hold in trust for A's wife and children. Held, this was a legal declaration of trust.⁷

51. Where an execution was levied on rents and profits for a term, and the creditor afterwards executed a written unsealed instrument, reciting that the note on which the judgment was founded belonged to another in part, and promising to pay him the rents and profits, or allow him the use and improvement of the estate after satisfying his own debt; held, a sufficient declaration of trust.⁸

52. Such declarations, however, must be under the party's hand, and clear and explicit. Thus, letters addressed by a son to his father and brothers, equivocal in their language, were held insufficient

¹ Barrell v. Joy, 16 Mass. 223.

² Rutledge v. Smith, 1 McCord's Cha. 119.

³ Orleans v. Chatham, 2 Pick. 29.

⁴ Scituate v. Hanover, 16 Pick. 222.

⁵ Armstrong v. Campbell, 3 Yerg. 201.

⁶ Pinson v. Ivey, 1 Yerg. 296.

⁷ Hampton v. Spencer, 2 Vern. 288.

⁸ Arms v. Ashley, 4 Pick. 71.

to prove that the former held an estate which he bought at a sale on execution against the father, in trust for the latter. So, with loose accounts, in which the father was charged and credited in connection with such purchase.¹

53. Parol evidence is admissible to control or explain such ambiguous declarations.²

54. It has been held in the United States Court, that if a grantee, in an account subsequently stated, credit the grantor with the proceeds of sale of a part of the land, this raises a trust.³

55. A trust cannot be established by parol evidence, even though this goes to confirm other written evidence, in showing the title to the land not to be in the supposed trustee, or to rebut parol evidence, which shows a fraudulent conveyance by such trustee.

56. A, the husband of B, conveys to C her father, all his interest in her land, for a nominal but no actual consideration. C, being insolvent, afterwards reconveys to B, taking her note for a small sum, with the mutual intent to protect the land from creditors. The land is afterwards taken by C's creditors. A, upon conveying to C, gave him a bond against exercising any control over B's estate. B always occupied the land. Held, no trust was legally proved, which would constitute a valuable consideration for the deed of C to B, and that C's creditors should hold the land.⁴

57. It has been held in Massachusetts, that the statute, establishing Chancery jurisdiction of trusts, had no effect upon the prior statute which excludes parol evidence of them.⁵

58. It is held, that where a transaction may be viewed as "*ex maleficio*," as where one purchases at sheriff's sale in trust for another, and refuses to fulfil it—the Statute of Frauds does not apply. But where an execution plaintiff purchased the land sold, agreeing with the defendant to reconvey on payment of his judgment, and took possession, greatly improved, and occupied for ten years; held, he was not bound to fulfil the trust.⁶

59. In cases of fraud, accident or mistake, it seems Chancery will interfere to enforce a parol trust. But, where A conveyed to B by an absolute quitclaim deed, expressing a valuable consideration, it was held in Chancery, that A could not prove by parol evidence, either according to the common law or the Statute of Frauds, an agreement by which B was to hold in trust for him, and subsequently execute a writing to that effect; and that B acknowledged the agreement, and was solicitous to have it fulfilled, but by negligence, accident, or some unaccountable cause of delay, the execution was delayed till B's

¹ Steere v. Steere, 5 John. Chan. 1.

² *Ib.*

³ Prevost v. Gratz, 1 Pet. Cir. 366.

⁴ Smith v. Lane, 3 Pick. 205.

⁵ Black v. Black, 4 Pick. 234.

⁶ Graham v. Donaldson, 5 Watts, 451-2.

death. And as the evidence went to show an *express trust*, it would not sustain the claim of an *equitable lien* for advances of money.¹

60. If a trustee executes a trust created by parol, he will be bound by it.²

CHAPTER XXIII.

TRUSTS. IMPLIED AND RESULTING TRUSTS.

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| 1. Implied trusts—not within the Statute of Frauds.
2. How proved.
6. General classification of.
8. Distinction between an express and implied trust.
9. Cannot contradict a deed.
10. Contract to convey land.
12. Purchase by one person with the money of another; parol evidence, &c.
23. Cases not within the rule.
34. Aliens.
36. Rules in different States.
40. Purchase with trust money. | 43. Election of cestui.
44. Conveyance without consideration.
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53. Consideration to be determined afterwards.
54. Trusts illegal, &c.
55. Trusts failing or exhausted.
56. Trusts to be afterwards appointed.
57. Renewal of leases, &c. in trustee's name.
64. Conveyance obtained by fraud.
65. Conveyance to a father in the name of a child.
82. Conveyance to husband and wife, &c |
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1. **IMPLIED** trusts are those which arise or are created, not by express act or declaration of parties, but by construction or implication of law. These are not affected by the English Statute of Frauds, or by the American statutes on the same subject, being in general specially excepted from their operation, or, if not, held to be excepted by necessary intendment;* and may be created since as before that statute without any instrument in writing. They are usually called *resulting trusts*.³

2. It is said, that an implied trust is more difficult of proof, but when proven has the same effect as an express one.⁴

3. It was said by Lord Nottingham, "the law never implies, the Court never presumes, a trust, but in case of absolute necessity.

¹ Dean v. Dean, 6 Conn. 285.

² Elliott v. Morris, Harp. Equity, 281.

³ Walk. Intro. 311. 5 Watts, 27. 1 Gill & John. 297. 3 Hayw. 57.

⁴ Miami Ex. Co. v. Bank of United States, Wright, 249.

* The Rhode Island Statute contains no exception, but this is implied. 1 Sumn. 186-7.

Otherwise, the Lord Chancellor might construe or presume any man in England out of his estate."¹

4. A distinguished commentator remarks, that this is too strong language, and suggests the following substitute.

5. "A trust is never presumed or implied as intended by the parties, unless, taking all the circumstances together, this is the fair and reasonable interpretation of their acts and transactions."²

6. Implied trusts are, 1. those which stand upon the presumed intention of the parties; 2. those independent of such intention, and forced upon the conscience of the party by operation of law, as in case of fraud or notice.³

7. It is remarked by the Court in Pennsylvania, that in England there are two kinds of resulting trusts. 1. Where a deed is made to A, but the purchase money is B's, the purchaser's; in which case, a trust results to B.* 2. Where trusts are expressly declared for a part of the estate; and then a trust results for the residue. There are other cases, where a specific lien is allowed, upon land purchased in part with money withdrawn from a trust fund. But these are not technically resulting trusts.⁴

8. The distinction between *express* and *implied* trusts has been thus stated. A trust, which results to a purchaser by operation of law, must be a pure unmixed trust of the ownership and title of the land or estate itself. Where there is a mere interest in the proceeds or a lien upon the land as security, or a claim upon the money to be raised by a sale or mortgage of it; these are subjects of express agreement, and require potential ownership in the trustee. They are too complex, and partake too much of the nature of contracts, to belong to the class of pure and simple trusts, the sole operation of which is to vest the estate in the actual purchaser, in exclusion of the nominal grantee, and not to regulate the equitable rights and interests of those, for whose benefit the legal owner may be under a moral obligation to hold or apply it. An implied trust seems often to partake of the character of an *executed use*, being saleable on execution and authorizing an ejectment against the trustee.⁵

9. In general, no resulting trust can arise in contradiction to the terms of a deed.⁶

10. It has been already seen, (p. 18) that Equity regards money, which has been agreed to be turned into land, as land. From this principle arises an important class of implied trusts.⁷ After a contract

¹ Cook v. Fountain, 3 Swanst. 585. (1 J. J. Mar. 3. 1 Bibb, 609.)

² 2 Story's Comm. on Equ. 439

³ Ib. 438.

⁴ Kialer v. Kialer, 2 Watts, 324.

⁵ White v. Carpenter, 2 Paige, 238-9.

⁶ 1 Sumn. 188.

⁷ 1 Cha. Ca. 39. 9 Mod. 78.

* A pays with B's money, and takes a deed to himself. No trust results. A pays with his own money, and takes the deed to B. This makes a resulting trust. (But see 2 Story, 445.)

for conveyance of land, the holder, until a conveyance is actually made, becomes a trustee for the other party.

11. After payment of the price, if the vendor and purchaser conspire to protect the land from creditors of the latter, Chancery will give relief.¹

12. Where one person pays the money for the purchase of land, but the conveyance is made to another, the former has a resulting trust in the land. So also, where a joint conveyance is made to both, whether to hold concurrently or successively; and such payment of the money may be proved by parol evidence.²

13. But the money must be paid before or at the time of the conveyance, in order to raise a resulting trust. A subsequent advance of money, either to the grantee or the grantor, may be evidence of a new loan, or the ground of some new agreement; but will not attach, by relation, a trust to the original purchase; for the trust arises out of the circumstance, that the moneys of the real, not the nominal, purchaser, formed *at the time* the consideration of that purchase, and became converted into the land.³ And the mere *charging* of a third person with the price of the land by the nominal purchaser, will not raise a trust for the former.⁴

14. It is not to be understood, that actual payment of money is necessary to constitute a resulting trust. Any other *valuable consideration* will undoubtedly have the same effect. Thus the agreement of one person to form a settlement and commence improvements upon lands, to be conveyed to another for his benefit, is a sufficient consideration to raise an implied trust for the former.⁵

15. The payment of the money by the real purchaser may be proved by parol evidence. But it must be clear and undoubted, of so positive a character as to leave no doubt of the fact, and at the same time so clearly define the trust, as that the Court may see what is requisite for its due execution. Evidence of naked declarations, made by the nominal purchaser, is most unsatisfactory, being so easily fabricated, and from the impossibility of contradicting it. And, on the other hand, the implication resulting from this fact, called by Lord Mansfield "an arbitrary implication," may be rebutted by parol evidence to the contrary. Before the St. of Frauds, a resulting trust might be controlled by a verbal declaration of trust; and, as this statute does not in any way affect implied trusts, the old law remains unaltered. More especially is such evidence admissible to rebut a resulting trust, where the purchase is made by a father, partly in the name of his son, although the father, during his life, took the profits of

¹ Forsyth v. Clark, 3 Wend. 637.

² 2 Story, 443. 2 Ventr. 361. 1 Vern. 109. 2 Atk. 71, 150. Sug. on Ven. 2, 152. 3 Mas. 347.

³ Botsford v. Burr, 2 John. Cha. 409. Hoxie v. Carr, 1 Sumn. 188. (Seward v. Jackson, 8 Cow. 406.)

⁴ 5 John. Ch. 19.

⁵ 1 Wend. 635.

the land. But parol evidence is inadmissible to rebut a resulting trust, arising from written instruments, unless the latter be loose and ambiguous.¹

16. It is said to be doubtful, whether parol evidence is admissible to prove a resulting trust, against the answer of the trustee denying it. And in cases of this nature, the claimant, in opposition to the legal title, should not delay asserting his right, as a stale claim would meet with little attention.² The lapse of twenty-six years has been held to bar the claim of a resulting trust.³

17. It has been said, that the admission of parol evidence to raise a resulting trust, where by the deed the consideration is expressed to be paid by the nominal purchaser, and there is nothing in the deed which implies the contrary, is limited to the life of such purchaser; that even his own confession cannot be proved by the testimony of a third person, but must be made under a judicial examination upon oath, or by the party's own answer in Equity, which, after his death, of course cannot be had. But Mr. Sugden doubts the correctness of this opinion, and refers to some very late authorities against it. Judge Story thinks, that any declaration or confession made by the party in his life is sufficient evidence. So also, any expression or recital in the deed itself; a memorandum or note made by the nominal purchaser; papers left by him, and discovered after his death; and, it seems, his answer to a bill of discovery.⁴

18. In New York and Kentucky, parol evidence is received against the answer of the purchaser denying the trust, and, it seems, even after the purchaser's death. But such evidence shall be received with great caution.⁵

19. It has been held, that a resulting trust might be proved by evidence merely circumstantial; as, for instance, the poverty of the nominal purchaser, and his inability to pay for the estate.⁶ This, it seems, must come in aid merely of other proof.

20. A resulting trust may be rebutted as to a part of the land itself, or a part of *the interest* in the land.⁷

21. It has been said, that no trust will result, unless the party interested paid the *whole* consideration. This doctrine, however, seems to have been overruled in England,⁸ and, in Pennsylvania, a purchase with trust money, *in whole or in part*, gives to the owner of the money a proportional interest in the land. So in Kentucky, where slaves

¹ *Malin v. Malin*, 1 Wend. 625. *Finch v. Finch*, 15 Ves. 43. *Lamplugh v. Lamplugh*, 1 P. Wms. 111. 1 John. Cha. 59; 2, 416. 4 Des. Cha. 491. 2 Sug. 153. *Belasia v. Compton*, 2 Vern. 294. 5 John. Ch. 1. 4 Har. & John. 551. 3 Mas. 362. 3 Littell, 399. 2 Wend. 109. 2 Sug. 158. *Harrison v. Menzies*, 2 Edw. Cha. 251.

² 2 Sug. 154-5. (*Fisher v. Tucker*, 1 M'Cord's Cha. 169-76.)

³ *Shaver v. Radley*, 4 John. Ch. 316.

⁴ 2 Story, 444 n. *Lloyd v. Spillet*, 2 Atk. 150 n. 2 Sug. 156-7.

⁵ *Boyd v. M'Lean*, 1 John. Ch. 582. *Snelling v. Utterback*, 1 Bibb. 609.

⁶ *Willis v. Willis*, 2 Atk. 71.

⁷ *Benbow v. Townsend*, 1 My. & Keen, 506.

⁸ *Crop v. Norton*, 9 Mod. 235. *Wray v. Steel*, 2 Ves. & Beam. 388. 3 Mas. 364.

were purchased by A, *in part*, with the money of B; held, a trust resulted to B *pro tanto*.¹

22. It is held in New York, that to constitute a resulting trust, the transaction must vest an absolute title in the cestui, making the trustee a mere conduit pipe or channel to convey the estate to him. It is not sufficient, that under a contract with the trustee the cestui is to have a *lien* upon the estate, or a share in the proceeds of sale. Nor can there be a resulting trust for a *certain amount of money*. If the trust results only in part, it must be for a specified portion of the estate, so as to make the parties tenants in common.²

23. But, in the same State, if a part only of the purchase money be paid by the cestui *que* trust, the land will be charged with the money advanced, *pro tanto*.³

24. It has been held, that where a *partner* buys real estate in his own name with partnership funds, without any previous agreement with his co-partners, although the joint business is that of dealing in lands, there is no resulting trust in favor of the latter. Hence, a note, given by the former, in his own name, for such purchase, does not bind the latter.⁴

25. But a contrary doctrine has been held in Pennsylvania and Kentucky; and in Equity, land purchased with partnership funds and on joint account, is held partnership property; and though the grantees be called *tenants in common*, parol evidence is admissible to prove the facts, and rebut the very slight presumption arising from this phrase.⁵

26. So it has been held in Pennsylvania, that if A buy land in his own name, under an agreement that B shall be equally interested with him, they are tenants in common.⁶

27. Though the evidence shows that a part of the land conveyed was intended as a gift; if a consideration was paid for another part—the whole being included in one deed, which expresses a consideration generally; there is a resulting trust for the whole.⁷

28. A grantor with warranty cannot set up a trust for himself, on the ground of an interest in the purchase money, as being the proceeds of sale of other land, in which the alleged trustee had only a life interest, and of which the grantor owned the reversion.⁸

¹ Kialer v. Kialer, 2 Watts, 324. 3 Bibb. 15.

² White v. Carpenter, 2 Paige, 238. ³ 2 John. Cha. 410.

⁴ Forsyth v. Clark, 3 Wend. 637. Pitts v. Waugh, 4 Mass. 424.

⁵ Phillips v. Cramond, Whart. Dig. 580. Hart v. Hawkins, 3 Bibb. 506. Hoxie v. Carr, 1 Sumn. 182. 2 Wash. C. C. 441.

⁶ Stewart v. Brown, 2 Ser. & R. 461.

⁷ Malin v. Malin, 1 Wend. 653.

⁸ Squire v. Harder, 1 Paige, 494.

* This case relates to the notorious Jemima Wilkinson, called by her followers "the Universal Friend." They supposed that her peculiar character and office disqualified her to hold property in her own name. The counsel who argued against the trust remarked, that her followers were the only witnesses for the trust. "They believed they were testifying in a controversy between their God and a mortal; and can it be supposed they believed they sinned, when they obeyed the mandates of their Deity, uttered not from Sinai, but from the mouth of their God?"

29. Where land owned by two persons is conveyed to a third, and reconveyed to one of the grantors, the other grantor has no resulting trust in the estate.

30. The wife of A owning lands in tail, they join in a conveyance to B in fee, who reconveys to A in fee. More than a year afterwards, A conveys to C. Upon a bill in Equity by a creditor of A to set aside the last conveyance, as fraudulent against creditors, held, no trust could arise out of these conveyances for A's wife and children, and that such trust was not legally proved by a declaration of it in the answer to the bill, which could have only the weight of parol evidence.¹

31. The principle of a resulting trust, as arising from the payment of the purchase money by one, and a conveyance to another, is not applicable, where one man buys land merely to *benefit another*, and admits, that if the latter will re-pay him the purchase money, he will convey the land; or where a man verbally employs an agent to purchase land for him, but pays no part of the price. These facts constitute a mere *conventional* trust, or trust by contract, which is void unless proved by writing. So, where a conveyance is executed conformably to a written agreement, no resulting trust can be raised by parol evidence.²

32. A and B agree, by parol, to purchase land; A to make the purchase, and B to pay one half of the price and take one half of the land. This is a case within the Statute of Frauds, and no trust results to B.³ So, if A buy in his own name and upon his own credit, the Statute of Frauds is applicable; and it cannot be proved by parol evidence, that the purchase was made for another's benefit.⁴ So, where a son conveyed land to his father, nominally as a purchaser, but in reality as a trust, to enable the father to raise money for the son by mortgage, and the father died without raising the money; held, though the son had a lien for the price of the land, parol evidence of the trust was inadmissible. Judge Story says, this case stands upon the utmost limits of the doctrine of the inadmissibility of parol evidence as to resulting trusts.⁵

33. A purchase by a third person at sheriff's sale, with the money or on account of the judgment debtor, raises a trust for the latter.⁶

34. No trust shall result to an alien. It would be a fraud upon the rights of the State and the laws of the land. If the alien is to have the proceeds of the land after satisfaction of certain express trusts by a sale, the surplus *escheats*, and may be reached in Equity by the State.

¹ Jones v. Slubey, 5 Har. & John. 372.

² Dorsey v. Clarke, 4 Har. & John. 551. St. John v. Benedict, 6 John. Ch. 111.

³ Parker v. Bodley, 4 Bibb. 102.

⁴ Fowke v. Haughtier, 3 Marsh. 57.

⁵ Leman v. Whitley, 4 Russ. 422. 2 Story on Eq. 442 n.

⁶ Deatly v. Murphy, 3 Mar. 477. 1 Dessau. 289.

So, if the alien is to have the rents and profits, the State may claim them in Equity.¹

35. In New York, where, as will be seen, the whole doctrine of uses and trusts has been fundamentally changed, no trust shall result to a party who pays the purchase money for land, except so far as to make the land liable for his debts existing at the time.²

36. In Massachusetts,³ it is provided by statute, that no trust shall be valid without writing "excepting such as may arise or result by implication of law;" and that no trust shall be valid against a subsequent conveyance or seisure on legal process, unless the purchaser or creditor had notice, express or implied.

37. It had been previously decided in this State, that payment of the purchase money of land raised no trust in favor of the party paying it, though the grantee gave him a bond to convey to his order. Nor is there in such case any fraud, which will subject the land to the claims of the creditors of the real purchaser. Perhaps such a transaction might constitute an unlawful conspiracy.⁴

38. The Court in New Hampshire remark,⁵ that Massachusetts is the only State, where resulting trusts have not been held to be excepted from the operation of the Statute of Frauds. In the same case they remark, that the usual clause in deeds, acknowledging receipt of the consideration, states only who *paid the money*, not who *owned it*. The ownership is a mere inference or presumption from the payment, and therefore, *on general principles*, may be rebutted by parol evidence. Besides, such clause is a mere *receipt*, which is always open to contradiction. The evidence in question does not go to *defeat the conveyance*. Moreover, the Statute of Frauds provides, that no grant, assignment, &c. of a trust *by any person*, shall be valid without a writing. But a resulting trust is a mere creature of the law. Hence it is concluded, that the statute would not apply to resulting trusts, even if there were no excepting clause.

39. Similar observations have been made by Judge Story.⁶ He remarks, in reference to a resulting trust, that the parol evidence does not establish any fact inconsistent with the legal operation of the words of the deed; but merely *engrafts a trust upon the legal estate*; and that the exception of resulting trusts from the Statute of Frauds is merely *affirmative*.

40. Where property is given to one in trust for the purpose of buying lands for another's benefit, and he does purchase lands, Equity will presume that he intended to act in pursuance of the trust. So,

¹ Phillips v. Cramond, Whart. Dig. 580. Leggett v. Dubois, 5 Paige, 114. 3 Leigh, 492.

² 1 N. Y. Rev. St. 728.

³ Mass. Rev. St. 408.

⁴ Storer v. Batson, 8 Mass. 442. Jenney v. Alden, 12 Mass. 375.

⁵ Pritchard v. Brown, 4 N. H. 399—400—1.

⁶ 1 Sumn. 186—7.

where one *covenants* to lay out money in lands, or pay it to trustees to be thus laid out. But the mere fact of his buying land will not be sufficient to create a resulting trust in favor of the other party, without some other ground to presume that the land was purchased with the trust money. It has been said, that the evidence of this fact must be clear.¹

41. Hence, where the trustee had died after such purchase, leaving no personal assets, it was held that the party, claiming to be cestui que trust, stood only on the footing of a simple contract creditor, and had no lien upon the lands purchased.²

42. Where the trust money is identified, a trust will result, according to some authorities, although the investment is not in pursuance but in *violation* of the trust. But others hold, that in such case the party interested has a mere lien.³

43. Where a trust results, in consequence of a payment of the purchase money of land, either by the cestui or another for his benefit, the cestui may at his election claim the money instead of the land.⁴

44. Another case of resulting trust is this. Where land is conveyed *without consideration*, express or implied, and no other distinct use or trust is stated; a trust results to the grantor. But the consideration may be either good or valuable. This rule is conformable to the ancient law of uses, by which the burden of proof was on the feoffee to show a consideration, and not on the feoffor to show a trust (for himself).⁵

45. The doctrine of resulting uses (see *supra* p. 198), first introduced the notion, that there must be a consideration expressed in the deed, otherwise a trust would result. But the rule as to implied trusts does not embrace every voluntary conveyance, and the smallest consideration is sufficient to prevent a trust from resulting to the grantor.

46. Where a deed expressed the consideration of five shillings and of natural love and affection, held, this consideration would be sufficient to prevent any resulting trust in favor of the grantor. But it is not conclusive, even with the addition of the clause, "and other valuable considerations." Thus, if the recital of the deed show that it is made for the payment of creditors, and there is a recital that unless they are paid the deed shall be void; a trust results to the grantor for the surplus over such payment.⁶

47. There can be no resulting or implied trust between a lessor and lessee, because the covenants in the lease are a sufficient legal con-

¹ 2 Story, 457.

² *Perry v. Phelps*, 4 Ves. 103. 17, 173.

³ 2 Story, 457, and n.

⁴ 2 Wash. C. C. 441. 2 Story, 457, and n.

⁵ *Norfolk v. Browne*, 1 Ab. Eq. 381. *Prec. in Cha.* 80. 2 Story on Eq. 440-1. *Bacon on Uses*, 317.

⁶ *Hagthorpe v. Hook*, 1 Gill. & J. 296-7. 2 Story, 442.

⁷ *Ib.*

sideration. But there may be an implied trust between the assignor and assignee of a lease.¹

48. It is said that in case of voluntary settlements and wills, if there is no declaration of the trust of a term, it results to the settler; otherwise, where it is a settlement for valuable consideration, and in the nature of a contract for the benefit of a wife or children.²

49. Where land is conveyed or devised to a trustee upon certain specified trusts, the residue of the estate, which remains after those trusts are satisfied, results to the grantor or his heirs.³

50. Devise to a trustee for ninety-nine years, in trust for the payment of certain debts, and an annual allowance to the sons of the testator, remainder to his eldest son for life, remainder to his first and other sons in tail, and a like remainder to the second son. The specified debts having been paid, other creditors of the sons bring their bill in Equity, praying that the term may be declared attendant on the inheritance, and held liable for their claims. Held, inasmuch as the trust of the term was satisfied, the remainder of it resulted to the first son of the testator.⁴

51. Although the same technical words are not required to create an estate by will as by deed, yet, when created, the same circumstances will raise a resulting trust to the heirs of the deviser in the former case, and to the grantor himself in the latter.⁵

52. There are several other distinct cases, in which a trust results by operation of law.

53. Where land is conveyed for a consideration, to be determined by the price for which the grantee shall sell it; a trust results to the grantor till such sale is made, in the same way as if the grantee had been expressly empowered to sell the land for the grantor's benefit.⁶

54. Where the legal estate in lands is conveyed, and trusts are annexed to it which are either illegal or contrary to public policy, the latter are void; and either the donee will take the absolute estate, or the whole trust result to the donor, as one or the other construction will best suppress the illegal purpose. Thus, where *slaves* were conveyed, in trust to permit them to live together, and be industriously employed, and the donee to control their morals, &c.; held, inasmuch as emancipation or a qualified slavery is contrary to public policy, and as the deed showed that the slaves were not to be the *property* of the donee, a trust resulted to the donor.⁷ Upon a similar principle, it has been seen, (s. 34), no trust will result to an alien.

55. So, where the trusts or objects of a limitation fail or are exhausted, a trust results.⁸

¹ *Pilkington v. Bayley*, 7 Bro. Parl. Ca. 383. *Hutchins v. Lee*, 1 Atk. 447.

² 1 Atk. 191. 1 Cruise, 314.

³ 2 Story, 442.

⁴ 1 Cruise, 314.

⁵ *Stevens v. Ely*, Dev. Eq. 493.

⁶ *Prevost v. Gratz*, 1 Pet. 367.

⁷ *Stevens v. Ely*, Dev. Eq. 493.

⁸ 2 Story, 443.

56. Where one conveys land to trustees for such uses and purposes as he shall appoint, and fails to make an appointment, a trust results to him and his heirs.¹

57. Where a trustee renews a lease in his own name, he shall hold it for the benefit of the cestui que trust. If a mortgagee, executor, trustee or tenant for life, having a limited interest, gets an advantage by being in possession or behind the back of the party interested in the subject, or by some contrivance in fraud; he shall not hold the same for his own benefit, but hold it in trust.²

58. And this rule applies, although the trustee requested a renewal for the cestui, before obtaining it for himself; more especially where the cestui is an infant. The Court will order an assignment of the lease to the infant; an account of the profits since the renewal; and that the trustee be indemnified from the covenants in the lease.³

59. A assigns to B a lease of land as security. Afterwards, for a consideration expressed but not actually paid, A agrees to give up one half of the land to B. B takes possession, surrenders the old lease, and takes a new and extended one. Held, the agreement to give up the land appeared on the face of it to be procured by undue influence, and by taking advantage of the former assignment; that the maxim "once a mortgage always a mortgage" was applicable, and that A should have the benefit of the new lease on payment of the amount due B.⁴

60. So where one partner, negotiating for a lease for the firm, received a large sum of money from the lessor for himself; held, he took it in trust for the firm.⁵

61. Upon the same principle, a purchaser with notice, from one having only a limited interest in the property, becomes a trustee for those beneficially entitled.

62. Thus, where A had a temporary right to certain slaves, the ultimate property being in minor children, and B, having notice of the title, purchased them from A; held, B should be a trustee for the children. Otherwise, with a purchaser from B without notice.⁶

63. If two parties are interested together by mutual agreement in writing for the purchase of land, and a purchase is made accordingly, one cannot appropriate the benefit exclusively to himself; but any private advantage makes him a trustee for the other. Whether the same rule applies where the agreement is parol, qu.⁷

64. Where a conveyance of land has been obtained *by fraud*, the

¹ Fitzger. 223.

² 2 John. Cha. 53-4.

³ Keech v. Sandford, Sel. Cas. in Chan. 61. 7 Bro. Parl. Cas. 367. 4 Bro. R. 16
1. 11 Ves. 383. 1 Dow. 261. Amb. 668, 734. 5 Bro. Parl. Cas. 19.

⁴ Holridge v. Gillespie, 2 John. Cha. 30.

⁵ Fawcett v. Whitehouse, 1 Russ. & My. 131.

⁶ Wamburzee v. Kennedy, 4 Dessaus. 474. (Phyfe v. Wardell, 5 Paige, 268.)

⁷ Flagg v. Mann, 2 Sum. 457.

grantee is in Equity a trustee for the grantor. So, any party in possession of land by fraud, is in Equity a trustee for the person beneficially interested.¹

65. An exception to the rule of resulting trusts in favor of the party who pays the purchase money of an estate, is where a *father* buys land and takes a conveyance to *his minor child*. Such transaction, founded upon the consideration of blood and affection, is held an *advancement* to the latter, made in fulfilment of the parental obligation of support. And though, during the child's infancy the father takes the profits, the law will intend that he does this as guardian. So, if the father occupy the land during his life, lay out money in improvements, devise the estate to other parties, and by his will provide otherwise for the son; the latter shall still hold the land. So, although the son gave receipts to tenants for the use of the father. An infant cannot be presumed to have been intended for a trustee.² In an early case, however, the extreme youth of the child was regarded as a reason for not considering the purchase as an advancement.³

66. Where the estate purchased by a father is conveyed to the minor son and a stranger jointly, the law still construes it an advancement for the child, more especially if the other grantee disclaims. In such case, it is said, if the child should die before the other grantee, the latter would then be a trustee for the father, and bound to reconvey to him. And this would seem to be the object of joining him in the deed, as well as the affording protection to the infant.⁴

67. A father agreed with his minor son to give him his own earnings, but the father occasionally received them, and, being then solvent, purchased lands of equal value, himself paying the price, but taking the deed in the son's name. The father occupied without rendering any account, and afterwards became insolvent. Held, the land was not liable to the father's creditors, the circumstances not justifying any presumption of fraud, inasmuch as the receipt of the son's earnings furnished an equitable consideration for the conveyance to him.⁵

68. But where a father, being indebted, buys and pays for an estate, and the conveyance is made to his children, and upon a bill in Equity by creditors of the former the father and children deny any advancement; this, with other slight circumstantial evidence, will be sufficient to charge the land with the father's debts.⁶

¹ 2 Atk. 150. 1 Paige, 147. 1 Cooke, 166.

² Parish v. Rhodes, Wright, 339. Grey v. Grey, 1 Chan. Cas. 296. Finch R. 341. Mumma v. Mumma, 2 Vern. 19.

³ Binion v. Stone, Nels. Cha. R. 68. (Jackson v. Matsdorf, 11 John. 96. Sampson v. Sampson, 4 Ser. & R. 333).

⁴ Lamplugh v. Lamplugh, 1 P. Wms. 111.

⁵ Jenney v. Alden, 12 Mass. 375.

⁶ Doyle v. Sleeper, 1 Dana, 631.

69. Parol evidence is admissible, in such case, to rebut the presumption of a resulting trust.

70. The same principle has been applied to a purchase made by a grandfather in the name of his grandson—the father being dead; and is also applicable, it seems, to a purchase made in the name of a natural child, if described as the child of the purchaser; because there is an obligation on the parent to provide for such children.¹

71. After the emancipation of a child from parental custody and support—as by his coming of age, marriage, advancement, &c.—a purchase by the father in his name will not, in general, be deemed an advancement, but will create a trust for the father. But the emancipation or advancement must have been complete and not merely partial. A child having only a reversion expectant on a life estate will be considered as unadvanced; and, even if he have been advanced, this will make no difference, if the father consider him as unadvanced. A purchase in the name of a child of full age, however, is to be considered as of equivocal effect, to be determined by the actual occupancy of the land during the father's life. If the father occupy, it will be considered as a trust for him; if the son, as an advancement.²

72. The principle above stated, making a transaction which would ordinarily create an implied trust, as between parent and child an *advancement*, is applicable not only where payment of the purchase-money by the former is the ground of the trust, but also where he conveys property to trustees, declaring the trusts only in part.

73. A father, by deed, reciting his wish to provide for himself during his life and his family afterwards, conveys his property to his son upon the trusts thereafter mentioned. He then declares trusts of a part of the property for his wife, daughter and niece. The son maintained the father many years. Held, there was no resulting trust for the father.³

74. Where a father purchases land and takes the conveyance to himself and a son jointly, although it was formerly held that the law would construe the transaction as an advancement to the son, it seems to be now settled, that they shall take together, each a moiety of the estate, and upon the father's death his share will be held liable in a Court of Chancery to his creditors—more especially where the father occupied the estate during his life, and it constituted the only assets for payment of his debts. In making this decision, it was said by the Court, that although “*stare decisis*” should be their governing maxim, yet the doctrine of advancement had been already far enough extended and ought not to be adopted in this case; where the form of

¹ *Ebrand v. Dancer*, 2 Cha. Ca. 26. *Lloyd v. Read*, 1 E. Wms. 608. *Fearne's Opin.* 327.

² *Finch R.* 341. *Elliott v. Elliott*, 2 Cha. Ca. 231. *Pole v. Pole*, 1 Vez. 76. *Sug. on Ven.* 2, 166. *Gilbert Lex Proto.* 271. 1 *Cruise*, 330.

³ *Cook v. Hutchinson*, *Keen*, 42.

conveyance showed a clear intention, on the part of the father, to be a joint owner of the estate. *A fortiori* the same principle would apply, in case of a limitation to the father for life, remainder to the son in fee.¹

75. The principle of the above-mentioned case has been questioned by very high authority; unless the case proceeded on the ground of fraud.²

76. It seems, parol evidence is not admissible to prove a trust for the father. The trust ought to appear upon very plain and coherent and binding evidence.³

77. No subsequent declaration by the father will be sufficient to raise a trust, where it is clear that an advancement was originally intended. Thus a devise by him will be of no effect.⁴

78. But, it seems, such devise to a third person, accompanied by a devise of other lands to the son, will put the latter to his election.⁵

79. Where the conveyance is proved to have been made by the father for a special purpose; as, for instance, to sever a joint tenancy; a trust will result to him.⁶

80. Some distinction, in relation to this subject, has been suggested between sons and daughters. But it is shrewdly remarked, that while daughters are less frequently advanced, they are also much less suitable for trustees, than sons.⁷

81. It is said, the presumption of advancement to a child ought not to be frittered away by nice refinements.⁸ In a leading case upon this subject,⁹ Ch. J. Eyre remarks, that the relation of a child rebuts a resulting trust, *as a circumstance of evidence*. But it would be a more simple view of the matter, to regard a child as a purchaser for valuable consideration, upon the same principle by which the consideration of natural love and affection raised a use at common law. This construction would shut out evidence on the other side, the introduction of which is "getting into a very wide sea." Thus where a son is *provided for*, the resulting trust is said not to be rebutted, though a father is the only judge what shall be a *provision*. So, the conveyance is termed a *prima facie* advancement. Hence the principle has been subjected to great uncertainty and variation.

82. A wife cannot be trustee for her husband. Hence a purchase in the names of the husband, the wife and a third person, A, for their lives and the life of the longest liver of them, gives to the wife an estate for life, and after her death an estate to A in trust for the executors of the husband. So where a man purchases an estate in

¹ *Scroop v. Scroop*, 1 Cha. Ca. 27. *Stileman v. Ashdown*, 2 Atk. 477.

² 2 Sug. on Ven. 170.

³ 2 Sug. on Ven. 166-8.

⁴ *Woodman v. Mowell*, 2 Free. 32. ⁵ *Mumma v. Mumma*, 2 Vern. 19.

⁶ 2 Sug. on Ven. 169.

⁷ *Baylis v. Newton*, 2 Ver. 28. (11 John. 96). ⁸ Sug. on Ven. 172.

⁹ 2 Story, 446.

¹⁰ *Dyer v. Dyer*, 2 Coxe, 92.

* But in this case, the bill in Equity of the father claiming the land was itself held to disprove a trust.

the names of himself, his wife and daughter, he cannot by a mortgage bind the land after his own death, and during the lives of the wife and daughter.¹

83. It is suggested, however, that a purchase in the name of a wife may be fraudulent against creditors. But, it seems, the St. of 13 Eliz. is not applicable to such case, because the husband might actually give the money which is paid for the land, and therefore creditors are not harmed. It seems *actual* fraud is necessary to avoid the transaction.²

84. If a husband purchase land in his own name with the money of the wife, a trust results to her, and a purchaser from the husband will be charged therewith.³

CHAPTER XXIV.

TRUSTS. NATURE, ETC. OF A TRUST ESTATE.

- 1. Analogous to a legal estate.
- 2. Alienation of.
- 3. Curtesy.
- 9. Dower.
- 16. Subject to debts.
- 28. Merger.

- 29. Actions by and against the cestui, &c.
- 36. Conveyance of the legal estate, when presumed.
- 39. Trust, how affected by lapse of time, and the Statute of Limitations.

1. A trust being a use not executed by the Statute of Uses, it was held, in some early cases, that trust estates were to be regarded as identical in their incidents with uses prior to this statute. But a different doctrine is now settled. Although a *cestui que trust* has no legal estate, yet, in the consideration of a Court of Equity, where only, for the most part, his title is recognised,* he is the real owner of the land. He has an equitable seisin of it, corresponding in all respects with the legal seisin that is acknowledged in Courts of law. In this respect, as in many others, Equity follows the law; and it is said, that if there were not the same rules of property in all courts,

¹ *Kingdome v. Bridges*, 2 Vern. 67. *Back v. Andrews*, Pres. in Cha. 1. 2 Vern. 120.

² *Sug. on Ven.* 171-2.

³ *Methodist, &c. v. Jacques*, 1 John. Cha. 450.

* Judge Story (on Equity, 2, 228) places trusts under the exclusive jurisdiction of Equity.

all things would be, as it were, *at sea* and under the greatest uncertainty.¹ All the *canons of descent* apply to trusts. They are alienable and devisable. So they are subject to the same classification—into inheritances, freeholds, and estates less than freehold; possession, remainder and reversion; and estates several and undivided—with legal estates. The same rules also apply to them, as to entailments and perpetuities.² It has been said, however, that though limitations of trusts cannot be *carried farther*, in the way of perpetuity, than legal interests; yet, it seems, they may be *more liberally expounded*.³

2. Any legal conveyance or assurance by a *cestui que trust* shall have the same effect and operation upon a trust, as it should have had upon the estate in law, in case the trustees had executed their trust. But, by a clause in the Statute of Frauds, universally adopted in the United States, all grants and *assignments* of trusts must be in writing and signed by the party. And, it seems, the effect of an assignment by the *cestui que trust* is not to change the estate of the trustee, but only to pass to the assignee precisely his own interest in the land.⁴*

3. A trust estate is subject to *curtesy*.⁵ A man devised lands to trustees in fee, in trust to pay his debts, and convey the surplus to his daughters A and B equally. A brings a bill for partition. C, the husband of B, being a defendant, alleges in his answer, that he married B under the belief of her owning the legal estate; that she was in receipt of the profits at the time of marriage, and the trust was not discovered till after her death. Held C was entitled to curtesy.⁶ But where land is given to trustees for the separate use of a married woman, the husband is not entitled to curtesy.

4. Devise to trustees in fee, in trust to apply the rents and profits to the sole and separate use of the testator's daughter A for her life, with a power of disposal and appointment to her. She having made no appointment, her husband claimed to be tenant by the curtesy, on the ground that the inheritance descended to her. Held, the whole legal estate was in the trustees; that although A had the (equitable) inheritance, she had no seisin in deed during coverture, and the husband had no equitable seisin and could not have possession or take the profits; that the testator had treated the wife as a *feme sole*, and neither in law or equity was there any claim to curtesy.⁷

¹ 1 Vez. 357. *Watts v. Ball*, 1 P. Wms. 108. 2 Bro. Rep. 371. *Burgess v. Wheate*, 1 Eden. 206. 2 Story, 236-7. 3 P. Wms. 234. 3 Des. Cha. 260. *Cashborne v. English*, 2 Abr. Eq. 728.

² Co. Lit. 290 b. (Butler's note.)

³ *Brailsford v. Heyward*, 2 Dess. 293. Walk. Intro. 340.

⁴ 2 Cha. Ca. 78. 2 Blackf. 198. 8 T. R. 494.

⁵ 1 Vir. R. C. 159. Alab. L. 247. 1 Sumn. 128.

⁶ *Watts v. Ball*, 1 P. Wms. 108.

⁷ *Hearle v. Greenbank*, 1 Vez. 298. 3 Atk. 695.

* It would seem to be otherwise with a use prior to the Statute of Uses. St. 1 Rich. III. c. 1, provided, that the conveyance of one having a use should be good against the feoffees to use. It will be seen (*infra* s. 23) that a sale on execution against the *cestui* has the same effect.

5. Money agreed or directed to be laid out in land may, in Equity, be subject to curtesy.

6. A woman devises to her daughter A \$300, to be laid out by her executors in land, which was to be settled to the use of A and her children, remainder over. The money was never thus laid out. After A's death and that of her issue, her surviving husband, by a bill in Equity, prays that the land may be purchased and settled on him for life, or the interest of the money paid to him for life. Held he should have the interest of the money.¹

7. It is said, that, notwithstanding some opinions to the contrary, the husband shall have curtesy in an equitable inheritance of the wife, though the rents, &c. are to be paid to her separate use during coverture. The receipt of them is a sufficient seisin. But if a devise is made to a wife for her separate and exclusive use, and with a clear and distinct expression that the husband is not to have any life estate or other interest, but that the same is to be for the wife and her heirs; Chancery will consider him as a trustee, and not allow any curtesy.²

8. Since a trust itself is subject to curtesy, it seems to follow of course that a legal estate, to which a trust is annexed, is not thus subject. It is said that tenant by the curtesy cannot stand seised to a use, for he is in by the act of law, in consideration of marriage, and not in privy of estate. But in Equity such tenant would be affected by the use or trust.³

9. In England, there is no *dower* in a trust-estate, whether the husband have himself parted with the legal title before marriage, reserving only in trust; or whether a trust estate has been directly limited to him by a third person. The same rule applies where the husband purchased an estate in the name of a trustee, who acknowledges the trust after his death.⁴ It has been said, that a trust does not differ from a legal estate, except in regard to *dower*.⁵

10. This point was first settled in the 12 of Ch. II., and has been since, though with apparent reluctance, uniformly adhered to. The grounds of decision are said to have been, partly the universal understanding of the community and corresponding practice of conveyancers, to depart from which would produce great confusion of titles, and defeat the intention of numerous limitations; and partly the phraseology of the Statute of Uses, which in its preamble recites, that by means of uses women had been defeated of their dower; which incident must still belong to trusts, a trust being since the statute what a use was before.*

¹ Sweetapple v. Bindon, 2 Vern. 536. (1 Vez. 174. 3 Bro. R. 404).

² 4 Kent, 31. Walk. 329. 3 Atk. 715. Co. Lit. 29 a, n. 6.

³ 2 Story, 234, n. 4.

⁴ Colt v. Colt, 1 Cha. R. 134. Bottomley v. Fairfax, Prec. in Cha. 336.

⁵ Ambrose v. Ambrose, 1 P. Wms. 321. Danforth v. Lowry, 3 Hayw. 68.

* Chaplin v. Chaplin, 3 P. Wms. 235. Att'y. Gen. v. Scott, For. 138.

* Another reason of the distinction made between curtesy and dower in trusts is

11. A distinguished English Judge (Sir Joseph Jekyll) was of opinion, that the rule of precluding a widow from dower in a trust, was applicable only where the husband created the trust by some act of his own, as by purchasing an estate in the name of a trustee, thereby showing a clear intent to cut off the claim of dower; and not where the land came to the husband by the act of a third person. The same Judge also held, that the widow should have dower, where a time is fixed for the trustee's conveying the legal estate to the husband, but the latter dies before such conveyance is made; upon the principle, that what ought to be done by a trustee, is regarded in law as actually done.¹

12. These distinctions, however, have been since rejected, and the rule against the right of dower in a trust estate held to be a universal one. The cases, in which the above-named suggestions of Sir J. Jekyll were made, are said to have turned upon their own peculiar circumstances, and not to warrant any general conclusion.²

13. But the widow of a trustee shall not have dower.³

14. In North Carolina, Virginia,* Illinois, Indiana, Tennessee and Ohio, a widow has dower in all equitable estates. In Pennsylvania, generally, only in legal estates; but she has dower in a trust, by an immemorial usage, which has never been questioned.⁴

15. In Ohio, equitable estates are enumerated, as "all the right, title and interest &c. held by bond, article, lease, or other evidence of claim." But while in legal estates dower is allowed of all lands owned during coverture, in equitable estates it is limited to such as the husband held at his death.⁵

16. By the English Statute of Frauds, trusts are made liable to the debts of the cestui que trust, and declared to be assets in the hands of his heir. The contrary had previously been held by the Courts, in analogy to the old law of uses. In North Carolina, equitable estates are declared to be personal assets; in Indiana, assets by descent in

said to be, that there had long been an understanding among the people, that a trust estate was not subject to dower, and numerous conveyances and settlements had proceeded upon this supposition. During coverture, a woman could not aliene without her husband; and therefore it was not deemed necessary to obtain her concurrence in a transfer of the land. But no one would purchase an estate subject to curtesy, without the assent of the husband. Therefore, the allowance of dower would operate injuriously upon purchasers, while that of curtesy would not, because they had provided against it. (2 Story, 237, n. 1. *D'Arcy v. Blake*, 2 Sch. & Lef. 387).

¹ *Banks v. Sutton*, 2 P. Wms. 708. (*Fletcher v. Robinson*, For. 139).

² *Godwin v. Winsmore*, 2 Atk. 525. *Forder v. Wade*, 4 Bro. R. 525. For. 139. Att. 8-15.

³ *Robison v. Codman*, 1 Sumn. 121.

⁴ 1 Vir. R. C. 159. Illin. R. L. 627. *Purd. Dig.* 221. 1 N. C. Rev. St. 614. 2 S. & R. 554. Ind. Rev. L. 209. Ten. St. 1823, 46.

⁵ *Walk. Intro.* 312, 324. *Smiley v. Wright*, 2 Ohio, 507.

* Independently of a statutory provision, there would be no dower. *Claiborne v. Henderson*, 3 Hen. & M. 322.

the hands of the heir. In Georgia and South Carolina, a trust estate is assets by descent.¹

17. Land held in trust cannot be sold by the administrator of the trustee as assets.²

18. Although the aid of a Court of Equity is required to obtain possession of a trust estate after the death of the cestui, yet, when obtained, it is legal, not merely equitable assets.³

19. In Massachusetts and Ohio, a trust estate cannot be taken in execution by a creditor of the cestui. In Ohio, it may be reached by a process in Chancery.⁴

20. Trusts are liable to debts in North Carolina, Virginia, Kentucky, Georgia, New York and New Hampshire.⁵

21. In Tennessee, where land has been sold under a deed of trust, it is redeemable as in case of sales on execution and Chancery decrees. In the same State, the English statutes, subjecting trusts to execution, are held to be in force. But they are applicable only to trusts created by or resulting from a conveyance, not to those which are merely *constructive* or *covenanted to be raised*. Thus, the interest of one holding an *obligation for land*, is not subject to execution.⁶

22. In New Hampshire, although the statute upon the subject provides only for levying executions upon estates in fee, it is the immemorial usage to levy them upon lesser estates and upon trusts.⁷

23. In North Carolina, the statute, subjecting trusts to legal process against the cestui, applies only to those cases where the estate is held solely in trust for the defendant. A sale on execution passes not only his interest, but the trustee's also. Hence, where there are other trusts, as for instance to sell and pay debts, a sale on execution against the cestui would injuriously affect third persons.⁸ So, in New York, a trust is not subject to an execution against the cestui, unless the trustee holds the legal title as a *clear simple trust* for the judgment debtor alone.⁹

24. A married woman, for whose benefit a trust has been created, even by herself before marriage, cannot by her own act subject the estate to be taken on execution.

25. A woman before marriage conveyed her property in trust for herself to her brother. The deed provided, that she and her future husband should remain in possession so long as they made a proper use of the property, and that whenever they should use it improperly,

¹ Bennet v. Box, 1 Cha. Cas. 12. 1 N. C. Rev. St. 278. Ind. Rev. L. 276. Prince, 1916. 2 Brev. Dig. 316.

² 1 Sumn. 121.

³ 2 Atk. 293.

⁴ Walk. Intro. 312. Russell v. Lewis, 2 Pick. 508. 12 Ib. 216.

⁵ 1 N. C. Rev. S. 266. 1 Vir. R. C. 159. 1 Ky. R. L. 443, 653. Prince, 916. 4 N. H. 402-3. Ontario, &c. v. Root, 3 Paige, 478.

⁶ Ten. St. 1823, 23. Shute v. Harder, 1 Yerg. 1.

⁷ Pritchard v. Brown, 4 N. H. 402-3.

⁸ Harrison v. Battle, Dev. Eq. 537.

⁹ Ontario, &c. v. Root, 3 Paige, 478.

it should be at the trustee's disposal. The husband and wife were always in possession. They joined in giving a note in settlement of a claim against him; upon which judgment was recovered, and her interest in the estate sold on execution, the creditor having notice of the trust. The purchaser, being the judgment creditor, brings an action of trespass to try title. Held, Chancery would restrain such action by an injunction.¹

26. A trust estate is not bound by any judgments, or any other claims of creditors, against the trustee. Nor can it be taken on execution.²

27. Where a trustee *by his own act* transfers the estate, the cestui may at his election hold him answerable. But where the alienation takes place by a decree against the trustee, the only remedy of the cestui is by a resort to the adverse claimant, and the property in his hands.³

28. A trust merges in the legal estate, when both become united in one person, because a man cannot be trustee for himself. But the rule is applicable, only where the legal and equitable estates are co-extensive and commensurate. If the former is an absolute, and the latter only a partial estate, there will be no merger, because it might be an injury to the party.⁴

29. How far a cestui que trust may support or defend against *an action for the land*, as between himself and the trustee, or himself and a third person, upon the strength of his equitable title, seems to be a point unsettled in England, and with us variously decided in the different States. Lord Mansfield held, that the cestui que trust might maintain ejectment, if the trust was clearly proved, but not otherwise; while Lord Kenyon ruled, that where the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a court of law, whether the action is brought by the trustee or by a stranger.⁵

30. In New York, a cestui, under a resulting trust, cannot set up a title in ejectment,⁶ nor can he set up his interest against the trustee, unless such interest is clear and precise. A patent for lands was granted to A, B and C, for themselves and their associates, being a settlement of *Friends* on the west side of S. lake, to have and to hold the same to said three persons as tenants in common for themselves and their associates. The plaintiff, claiming under the patents, brings ejectment against the defendant, a member of the so-

¹ *Wilson v. Cheshire*, 1 McCord's Cha. 233.

² 2 Story, 242. 2 Blackf. 196. 4 J. J. Mar. 599.

³ *Cobb v. Thompson*, 1 Mar. 513.

⁴ *Wade v. Paget*, 1 Bro. R. 363. 3 Ves. jr. 126. (1 John. Ch. 422. 3, 53).

⁵ 3 Burr. 1901. Cowp. 46. Doug. 721. 8 T. R. 122. 1 Pet. 299, 430. 1 Penning, 50.

⁶ 8 John. 488.

ciety, who had paid a proportion of the purchase money. Held, the defendant's title was too uncertain to prevail against the plaintiff's legal claim.¹

31. In Pennsylvania, a cestui que trust may maintain ejectment, and the legal title of the trustee cannot be set up against him by a third person.²

32. So a purchaser of land may bring ejectment against the vendor upon a mere agreement, after tender of the price; and the vendor against the purchaser, if the price be not paid.³

33. In Massachusetts,⁴ if a trustee bring a real action against the cestui, upon the plea of "nul disseisin," the former shall prevail. But the tenant may plead specially the trust, and that he is in possession as tenant at will, taking the rents and profits.

34. In Ohio, a trust cannot be taken advantage of in ejectment, and a Court of law will not notice it.⁵

35. A cestui may maintain ejectment, after the purposes of the deed of trust have been satisfied.⁶

36. Where the circumstances of a case are such, as to require or justify the presumption, that the legal estate has been conveyed to the beneficial and equitable owner; the jury may be instructed to rely upon such presumption, and give their verdict in favor of the latter. This presumption arises from long-continued possession by the cestui, and those under whom he claims. Although somewhat analogous to the title acquired by an adverse occupancy; it is not precisely similar, because the possession may have been held under the equitable instead of the legal title. But the presumption, in this case, is founded upon the principle, that the law will consider as done that which ought to have been done. Like the presumption of a grant, it does not proceed upon the belief, that the thing presumed has actually taken place, but is adopted from the principle of quieting the possession, and the impossibility of discovering in whom the legal estate, if outstanding, is actually vested. Mere possibilities are not to be regarded. The Court must govern itself by a moral certainty; for it is impossible, in the nature of things, there should be a mathematical certainty of a good title. Hence, though the evidence of actual reconveyance be slight and inconclusive, yet, if it can be ascertained at what period the legal estate ought to have been reconveyed, such reconveyance may be presumed.⁷

37. Bill in Equity, for specific performance of an agreement to pur-

¹ Jackson v. Simson, 2 John. Cas. 321.

² Kennedy v. Fury, 1 Dal. 72. Smith v. Patton, 1 Ser. & R. 80. (See 5 Watts, 391.)

³ 4 Binn. 77. 2 Yeates, 344. 1 Yeates, 12.

⁴ Russell v. Lewis, 2 Pick. 510. (7 Mass. 199.)

⁵ Walker's Intro. 316.

⁶ Hopkins v. Ward, 6 Mun. 41.

⁷ 2 John. 226. 13 John. 516. 12 Ves. 250-4. 2 Atk. 19. Cowp. 215.

chase land. Defence—a want of title in the plaintiff. It appeared that the land was conveyed in 1664, by way of indemnity, against the eviction of another estate, with a provision for reconveyance of one moiety after the expiration of two lives, and eleven years thereafter. For one hundred and forty years no claim appeared to have been made under this deed; but the grantor, and those claiming under him, were always in possession, although the deed was once mentioned in an instrument relating to the land made in 1694. Held, a reconveyance might be presumed, as to one half, at the time stipulated, and as to the other, when the danger of eviction might reasonably be considered at an end, which must have been in much less time than one hundred and forty years; and that the title was good.¹

38. But where a trust was presumed, from strong circumstances, once to have existed, after the lapse of forty years, and the death of all the original parties, it was also presumed to be extinguished.²

39. On the other hand, the question may arise, how far the rights of a cestui que trust are impaired by mere lapse of time. On this point it is held, that *express, direct, or pure* trusts are not within the Statute of Limitations; but *implied or constructive* trusts are. The latter have been defined, as those of which Courts of law have jurisdiction.³ The Supreme Court of the United States have said, that where a trust is clearly established, more especially if there has been fraud, *on principles of eternal justice*, lapse of time shall be no bar to relief.⁴

40. One having the legal title to land, conveyed it to a purchaser, having no notice of any trust, and he, after eighteen years, devised the land. Held, after the lapse of thirty years, a person claiming a trust in the property was barred.⁵

41. As between trustee and cestui, the former does not cease to stand in that relation, by any wrongful act, in regard to the estate; except at the election of the latter. It is said that trusts are excepted from the Statute of Limitations, only as between the trustee and cestui.⁶

¹ Hilary v. Waller, 12 Ves. 239.

² Prevost v. Gratz, 6 Wheat. 481.

³ 3 Hayw. 253. Shelby v. Shelby, 1 Cooke, 182. Kane v. Bloodgood, 7 John. Ch. 111. 4 Hawk. 413. Van Rhyne v. Vincent, 1 M'Cord's Cha. 313.

⁴ Prevost v. Gratz, 6 Wheat. 496. (See 2 Story, 735 & seq.)

⁵ Cox v. Smith, 4 John. Cha. 271.

⁶ 4 Hawk. 413. Fisher v. Tucker, 1 M'Cord's Cha. 176.

CHAPTER XXV.

TRUSTS—CESTUI AND TRUSTEE—THEIR RESPECTIVE INTERESTS, RIGHTS AND DUTIES, AS BETWEEN THEMSELVES, AND IN RELATION TO THIRD PERSONS.

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1. THE three leading incidents of a trust, as of a use at common law, are *pernancy of the profits, execution of estates, and defence of the land*.¹ The first and last of these properties seem not to require any particular comment. With regard to the second, it is said, that where a cestui has an absolute interest in the trust, he may compel the trustee to convey the legal estate to himself or any one whom he shall appoint.² Of course, the cestui has no such right, where the trust is created only in part for his benefit; as, for instance, where annuities are first to be paid by the trustee. And the rule seems equally inapplicable to that numerous class of cases, in which a leading object of the party, who conveyed or devised the land, was to vest the legal estate permanently in the trustee and his successors, and such object would be defeated by compelling them to part with it. The rule is, that, in the exercise of a *sound discretion*, Equity will compel the trustee to transfer the legal estate, unless the intent of the party creating the trust require that he receive the profits.³

2. Thus, where one devised the use and improvement of land for the support of a child, providing that, so long as he should be industrious and economical, he should be entitled to the use and improve-

¹ See p. 191.² 1 Cruise, 350.³ 2 Leigh, 359. *Jasper v. Maxwell*, Dev. Eq. 357.

ment, and to all he should raise by virtue of the improvement; the cestui, if shown to be incapable and of intemperate habits, though he were so in the testator's life-time, shall not recover possession from the trustee.¹

3. It is doubtful, whether a trustee can safely make a conveyance to execute the trust, without a decree of Equity. It is the general rule, in case of infants, that a trustee cannot be excused from strict performance without a decree.² In Kentucky, a sale by a trustee is invalid, unless made under a decree, or unless the party creating the trust joins.³

4. A trustee cannot justify his refusal to convey the estate, by buying in an outstanding title.⁴

5. It is the general rule of Equity, that neither any act nor any omission, on the part of a trustee, shall be allowed to prejudice the *cestui que trust*.⁵ To prevent this, Equity will treat money as land and land as money, and consider that which ought to be done as actually done.⁶ So long as the subject of an express or implied trust remains in the hands of the trustee, or of his heirs, executors, administrators or devisees, the Court of Chancery will lay hold of it for the benefit of the cestui.⁷

6. Where a cestui is of age, the trustee has no right, unless expressly empowered, to change the nature of the estate; to convert land into money or the converse. Otherwise, it seems, if the cestui is an infant.⁸

7. Even where a trust consists in a mere *executory agreement* between the trustee and a third party, such agreement cannot be revoked to the prejudice of the cestui. Thus, where a father contracts in writing for the purchase of land in trust for his son, the trust will be enforced, although the vendor afterwards, with the father's consent, devised the land to another person.⁹

8. But if a trustee convey the land held by him, for a valuable consideration, to a person who is ignorant of the trust, the latter shall hold it discharged therefrom. It has been seen,¹⁰ that a creditor of the trustee cannot take the land to satisfy his debt; and in this respect it seems to make no difference whether the creditor has notice of the trust or not. But a mortgage by the trustee, though, like a judgment, it is a mere incumbrance, will pass a title to an ignorant mortgagee discharged of the trust.¹¹ In order to pass a perfect title to the purchaser from a trustee, there must be both a want of notice and

¹ Root v. Yeomans, 15 Pick. 488.

² 2 Story on Equity, 243. Wood v. Wood, 5 Paige, 597.

³ 1 Ky. Rev. L. 449.

⁴ Kellogg v. Wood, 4 Paige, 578.

⁵ 3 P. Wms. 215, 2, 715.

⁷ Ridgely v. Carey, 4 Har. & McHen. 198.

⁸ 2 Story, 242.

¹⁰ P. 227.

⁶ See p. 18.

⁹ Taylor v. James, 4 Des. 1.

¹¹ 1 P. Wms. 278.

a valuable consideration. Neither is sufficient of itself. Hence a gratuitous grantee without notice, and a purchaser for consideration with notice, shall be alike held chargeable with the trust.¹

9. To constitute the notice requisite to charge a purchaser, it is sufficient that he has such information as ought to put him on inquiry.²

10. The pendency of a suit in Equity by the cestui against the trustee—after the service of a subpoena and filing the bill—is implied notice.³

11. But not a recital in a deed between third persons, though registered.⁴

12. Possession of the land by the cestui is implied notice of the trust.⁵

13. The purchaser from a trustee is chargeable, if he have notice of the trust, though he have no notice who is the cestui.⁶

14. Where an insolvent trustee sells, partly for cash and partly in payment of his own debt, a mortgage given to him on the face of it as trustee, the purchaser is chargeable with the trust.⁷

15. But where a survey of wild land, without an entry in the book of entries, constitutes no appropriation, notice of such survey to one holding a subsequent land warrant does not affect his title.⁸

16. If an executor, not in advance to the estate, dispose of the property for his own private purposes, whether in payment of a debt or for a new pecuniary consideration; the purchaser, having notice, is chargeable with the trust.

17. A, an executor, empowered to sell lands, sells them, and takes a deed of trust for the price, which he afterwards assigns as security for his own debt. The assignment refers to the deed of trust, which refers to the original deed, which refers to the will. Held, the assignee was chargeable with the trusts of the executor.⁹

18. So an assignment of a deed of assignment is sufficient notice of the trusts contained in the latter.¹⁰

19. If a trustee repurchase the estate from a purchaser without notice, the trust will revive as a charge upon the land in his hands.¹¹

20. But, in general, a purchaser without notice from one with notice, is not chargeable with the trust.¹²

21. So a purchaser with notice from one without notice.¹³

22. The rule above-stated relates to *unauthorized* transfers by a trustee, which involve a violation of duty on his part. A different

¹ 6 Pick. 18. 1 Verm. 101. 1 Cranch, 100. 1 Gill & J. 271. 1 McCord's Cha. 119.

² 2 Paige, 202.

³ Murray v. Ballou, 1 John. Cha. 566.

⁴ Ib.

⁵ Pritchard v. Brown, 4 N. H. 404.

⁶ Maples v. Medlin, 1 Mur. 219.

⁷ Pendleton v. Fay, 2 Paige, 202.

⁸ Wilson v. Mason, 1 Cranch, 100.

⁹ Graff v. Castleman, 5 Rand. 195.

¹⁰ 7 Cranch, 69-97.

¹¹ Bovey v. Smith, 1 Cruise, 526.

¹² Buggus v. Platner, 1 John. Cha. 213.

liability attaches to the purchaser of trust property, which the trustee was empowered and directed to sell for a certain specified object. The general rule is, that the deed of a trustee conveys an absolute title at law, without proof by the purchaser that the conditions of sale have been complied with. But in Equity it is otherwise.¹

23. Where one conveys or devises land to trustees, to be sold or mortgaged for payment of specified debts or legacies, or to obtain money to be invested in funds, the purchaser, mortgagee, &c. is bound to see to the application of the money, or the land will still be liable in his hands.²

24. So, where land was sold under a decree in Chancery, for payment of certain debts ascertained by a report of the master; it was held that the purchaser was charged with the application of the money.³

25. The same liability attaches to a purchaser, where the purchase money is to be applied by the trustee to any other definite and specific object; as, for instance, where an act of Parliament granted land in trust, to be sold, and the proceeds applied to the rebuilding of a printing house. And the rule is no less applicable, where lands are liable to debts without express charge, as is universally the case in the United States, than in England, where they are not thus liable; because, though no charge is superadded by the will, *as between the devisee and the creditor*, the relation of the devisees to each other is materially affected by it.⁴

26. Where the trustee is required to invest the proceeds of sale in a certain way, it seems the liability of the purchaser extends so far only, as to make him responsible for such original investment; and that he is not answerable for any subsequent misappropriation, either of the funds themselves, or interest or dividends arising from them.⁵

27. Unless the debts and legacies are specified, the purchaser is not responsible for the application of the purchase money. That is, unless the debts are specified, he is liable for neither; the debts being payable first. And in this respect it is immaterial, whether the land is expressly given *in trust*, or merely *charged* with debts. A charge is a devise of the estate, in substance and effect, *pro tanto*, upon trust to pay the debts.⁶

28. Although most of the cases, in which the doctrine above-named has been established, seem to relate to trustees, yet there is another class of decisions, in which a distinction is made between a purchase

¹ Taylor v. King, 6 Mun. 366-7.

² Dunch v. Kent, 1 Ver. 260. Spalding v. Shalmer, Ib. 301.

³ Lloyd v. Baldwin, 1 Ves. 173. (Lining v. Peyton, 2 Dessaus. Cha. 378).

⁴ Cotterel v. Hampson, 2 Vern. 5. 12 Wheat. 501.

⁵ 2 Booth's Cas. and Opin. 114.

⁶ Jebb v. Abbet, 1 Bro. 186, n. 1 Vern. 261. Williamson v. Curtis, 3 Bro. 96. Amb. 677. 6 Ves. 654, n. 7, 323. Rogers v. Skillicorne, Amb. 188. Gardner v. Gardner, 3 Mas. 218-9. Andrews v. Sparhawk, 13 Pick. 393.

from a mere heir or devisee, charged with payment of debts, and one from a trustee, who is the *hand to receive the money*, and whose receipt therefore is said to be a perpetual discharge.¹ * Sir William Grant remarked, that the doctrine on this subject had been carried farther than Equity would warrant; and that although, where one purchased from a trustee having no right to sell, he ought to be charged with the trust, yet where the trustee had such right, he should be able, as incident thereto, to give a receipt for the price.²

29. Thus, where an estate was limited to trustees for payment of debts and legacies, the trustees having raised the money, but misappropriated it; held, the creditors and legatees had no further lien upon the land, but having once borne its burthen it went to the heir; that the estate was debtor for the debts and legacies, but not for the faults of the trustees.³

30. It is a common practice, to make express provision in the deed or will, that the receipt of the trustees shall be a sufficient discharge to the purchaser. In such case, the latter is of course exempt from all liability. But if there are several trustees, the receipt of a part only will not discharge a purchaser with notice, although the others have refused to act and conveyed their interest to their fellows. An express renunciation of the trust, however, would dispense with the necessity of a signing by the trustee who renounced.⁴

31. Where a trustee, empowered to sell the land and reinvest the proceeds to the same uses, joins in a conveyance with the cestui; held, in South Carolina, partly on the ground of local circumstances and usage, that the purchaser is not responsible for the disposition of the money.⁵

32. The whole doctrine of the liability of a purchaser, either from trustees or other parties authorized to sell, for the right application of the purchase money, seems to have been overruled or very much shaken by the Supreme Court of the United States, in the case of *Potter v. Gardner*.⁶ In this case, the testator devised an estate to his son A, in fee, "he paying all my just debts out of said estate. And I do hereby order, &c. that my son shall pay my debts out of the estate," &c. A sold the estate to B. The executrix and other devisees filed a bill in Equity against A and B, for the purpose of charging B with the application of the money to the debts of the testator. It appeared, that a part of the purchase money was paid, by extinguishing debts due from A to third persons, and a debt due from A to B, and that another part remained due in the form of a note not

¹ *Cuthbert v. Baker*, Sug. Ven. 378. 4 Ves. 99.

² *Balfour v. Welland*, 16 Ves. 151-6.

³ 1 Salk. 153.†

⁴ *Crewe v. Dicken*, 4 Ves. 97.

⁵ *Lining v. Peyton*, 2 Dessaus. 375.

⁶ *Potter v. Gardner*, 12 Wheat. 496.

* This distinction is rejected in Massachusetts. 13 Pick. 401.

† It does not appear that the debts were specified.

negotiable. Held, B should be charged with such part of the purchase money as remained unpaid, *absolutely*; and with such part as had been applied to the debts of A, *contingently*;—the decree, in regard to the latter, being in the first instance against A, and, on his failure to pay, against B. The Court remark, that no question seemed to be made as to the authority of those *modern decisions*, which deny the distinction between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee for the payment of debts. In either case, the person who pays the purchase money to the person authorized to sell, is not bound to look to its application, unless the money is misapplied (as in this case) with his cooperation.*

33. It is said, that where lands are devised in trust to be sold for payment of debts, in case the personal estate shall prove insufficient for that purpose, a purchaser without notice acquires a good title as against the heir, although the personal estate is not insufficient. The law does not require him to look into the condition of the testator's estate. But implied notice is sufficient to impair his title; as, for instance, a *lis pendens* to have an account, between the heir and executor.¹

34. This doctrine, however, is denied by high authority; and it is laid down, that when a *power* is given to executors to sell for this purpose, deficiency of personal estate is a condition precedent to a good title in the purchaser.² And, inasmuch as the personal estate is by implication primarily liable, it seems the same rule is applicable, although the will does not expressly order that it be sold in the first instance.

35. An order of Court, authorizing a sale of lands, is conclusive of its validity, though it turns out that there were personal assets.³

36. Where a trustee is authorized generally to sell lands for payment of debts, a purchaser acquires a good title, although more was sold than was necessary for this object; more especially where the sale takes place under a decree of Chancery, and with the consent of parties interested. Hence, under such circumstances, a purchaser cannot avoid the bargain, by alleging a defect in the title.⁴

37. Joint trustees have all an equal interest and authority, and must join in conveyances and receipts. But where one only receives money, the others, though joining in a receipt for it, will not in gen-

¹ *Culpeper v. Aston*, 2 Cha. Ca. 115. *Coleman v. McKinney*, 3 J. J. Mar. 249.

² *Fearne's Opin.* 121. *Sug. Ven. & P.* 343.

³ 7 Mass. 292.

⁴ 1 Vern. 303. *Lutwych v. Winford*, 2 Bro. R. 248.

* With regard to this case it is to be observed, that although the language of the Court disavows the liability of bona fide purchasers, in *any case*, yet the facts would warrant no other decision, even according to the old rule, because *the debts were not specified*. Story J. lays down the same rule, but *with this important limitation*. (S. C. 3 Mass. 218). And the Supreme Court in Massachusetts adopt his views. (*Andrews v. Sparhawk*, 13 Pick. 401).

eral be held accountable. An express provision is almost universally inserted in trust-deeds, that each trustee shall be accountable only for such sums as actually come to his hands.¹

38. The general rule is, that a trustee shall not be allowed to derive any personal advantage from his trust. Hence, if he compound a debt due from the estate, the profit goes not to him but to the cestui que trust. But if in good faith and with discretion he release a debt, he shall not sustain any loss thereby.²

39. Where a trustee commits a breach of trust, he will be held strictly accountable. Thus, if he wrongfully sell the estate, he shall answer to the cestui for its full value.³

40. One trustee is also liable for concealing the wrongful acts of another.

41. A trustee in possession shall account for all that might have been received from the estate.⁴

42. Where a trustee, authorized to sell lands, and apply the proceeds to payment of debts or purchase of stock, exchanges them for other lands, he shall account for the full value of the lands exchanged.⁵

43. It has been intimated in England, and expressly decided in Massachusetts, that a cestui que trust may maintain an action at law against his trustee for breach of trust, as upon an implied assumpsit. Of course, in England, the cestui stands on the footing of a mere simple contract creditor.⁶

44. It was formerly held, that a trustee could not be allowed any compensation for his services. This rule was founded upon the reasons, that by such allowance the estate might be exhausted ; that it was impossible to fix upon a fair amount, one man's services being worth more and another's less ; and that the trustee had his option, whether to accept or refuse the office.⁷ * This rule seems to be still in force in Ohio, and in New York it has been held doubtful, whether even a positive agreement with the cestui for compensation, made after creation of the trust, is binding.⁸

45. But where the party creating the trust directed that the trustees should be compensated, it was held that such order should be carried into effect ; and the amount of compensation was referred to the master to settle.⁹

¹ *Fellows v. Mitchell*, 1 P. Wms. 81. *Bartlett v. Hodgson*, 1 T. R. 42. (*Kip v. Deniston*, 4 John. 26).

² 3 P. Wms. 251. 9 S. & R. 204. (*Forbes v. Ross*, 2 Bro. Rep. 130).

³ *Smith v. French*, 2 Atk. 243. 1 Har. & Gill. 11.

⁴ 1 Bro. 68. *Rogers v. Rogers*, 1 Paige, 188.

⁵ *Ringgold v. Same*, 1 Har. & Gill. 11.

⁶ 2 Atk. 612. 7 Mass. 198. For. 109. 2 Atk. 19. (1 Dessaus. 216).

⁷ *Treat of Eq. b. 2, c. 7, s. 3.* ⁸ *Walk. Intro.* 314. 1 John. Chs. 527.

⁹ *Ellison v. Airey*, 1 Ves. 112.

* Another reason assigned, is, that there is much solicitude and vexation in most trusts, which cannot be compensated by money. 16 Mass. 228.

46. In Massachusetts, a trustee is allowed a commission of five per cent. on the gross amount of all the property that has come to his hands, and the allowance of a commission will not prevent that of specific charges also. In Pennsylvania, an executor is always compensated. So, in Virginia, compensation is allowed to a trustee.¹

47. It is said, that the cestui que trust ought to save the trustee harmless as to all damages relating to the trust. Upon this principle, a trustee shall be liberally allowed all reasonable costs and charges incurred in the management of the estate. Thus, if he bring a suit to recover the land, he will not be limited, in a settlement with the cestui, to the taxed costs, but will be allowed the expenses actually incurred in the suit. But he will not be allowed the expenses of actions of assault and battery brought against him, though arising from his defence of the estate. Where he has advanced money, without any probability of gaining by it personally, the amount shall be reimbursed to him. It is now usual to provide expressly for the reimbursement of all costs and expenses incurred in executing the trust. If the trustee pays off an incumbrance, he may reimburse himself from the property, and leave the cestui to call upon the grantor on his warranty, instead of doing it himself.²

48. In Massachusetts and New York, a trustee will not be allowed the cost of *permanent improvements*, such as building, clearing, road-making, &c. ;* and regard must be had to the probable duration of the trust, in determining what improvements fall under this designation. If by means of improvements the rent of the property is increased, the cestui may be put to his election between disallowing the charge and receiving the increased rent. And the trustee shall be allowed for reasonable *repairs*. So it has been held in New York, that where lands are purchased in trust with the money of a wife, the trustee, whether the husband or a stranger, shall be allowed for permanent improvements.³

49. The policy of the law requires, that the relation of trustee and cestui should be guarded with vigilance, and contracts between them scrutinised, that no injustice should be done the cestui.⁴

50. Upon this principle is founded the general rule, that a trustee shall not be allowed to purchase the trust property for his own benefit, either directly or through an agent. It is said to be a plain point of Equity, and a principle of clear reasoning, that he who undertakes to act for another in any matter shall not, in the same matter, act for

¹ *Barrell v. Joy*, 16 Mass. 221. 3 Bin. 560. 9 S. & R. 204, 223. 11 Pick. 120. 15, 471. 4 Watts, 267. 4 Hen. & Mun. 415.

² *Trott v. Dawson*, 1 P. Wms. 780. 1 John. Cha. 29. *Amand v. Bradburn*, 2 Cha. Cas. 128. 2 McCord's Cha. 82. 7 Bro. Parl. Cas. 266. *Pierson v. Thompson*, 1 Edw. Cha. 212. 2 P. Wms. 455. *Murray v. De Rottenham*, 6 John. Cha. 62. 1 Bin. 495.

³ *Rathbun v. Colton*, 15 Pick. 471. 1 John. Cha. 450.

⁴ *Ringgold v. Same*, 1 Har. & Gill, 11.

* Otherwise in Pennsylvania. 1 Bin. 495.

himself, and make the business an object of interest. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit. Hence, in whatever shape a profit accrues to the trustee, whether by management or good fortune, it is not fit that benefit should remain in him. It ought to be communicated to those whose interests, being put under his care, afforded him the means of gaining that advantage. He takes the land clothed with the same trusts as it was liable to in his hands previous to the sale. The principle applies not merely to trustees, technically so called, but to *judicial officers*, and all persons concerned in disposing of the property of others, such as attorneys, commissioners, sheriffs, &c.¹

51. The above-named principle seems to have been limited in some cases to a purchaser from an *infant* cestui que trust. But this restriction is now done away ; and, although the cestui be of age, the transaction morally fair and honest, a higher price paid by the trustee than any one else would give, the estate taken at an appraisalment or in the name of a third person ; yet, upon the ground of general inconvenience, the transaction may be set aside by the cestui. The trustee purchases, subject to that equity.²

52. But where the estate is sold under a decree of Chancery, by an open bidding before the master ; or where, in case of a trust for creditors, a majority of them assent ; the purchase, it seems, will be sustained. In Pennsylvania, the circumstance that a sale is a judicial one is held to make no difference. So, in South Carolina, if made at the instance of the trustee, it is held to be his sale. And the mere fact of a public sale does not make the sale valid. So where, in a sale made by executors, one of them became a joint purchaser and afterwards sole owner, held, although the sale was ratified by the heirs and devisees, the land was still liable to be taken by creditors.³

53. If the property purchased by the trustee is a lease, and he renews it in his own name, the renewal shall be for the benefit of the cestui.⁴

54. If, after purchasing the estate, the trustee resells it at an advance, the cestui may affirm the sale, and claim the profits. But, in such case, the trustee shall be allowed money paid to his agent for making the purchase.⁵

55. One to whom a legacy is given, coupled with a trust, is chargeable with the latter, and cannot legally deal with the cestui.⁶

¹ 3 Ves. jr. 740. *Hayward v. Ellis*, 13 Pick. 272. 4 John. Cha. 120. *Voorhees v. Stoothof*, 6 Halst. 145. 3 Har. & J. 99, 5, 147. 1 Mon. 44. 2 Rawle, 392. 2 Whart. 53. *Misso. St.* 426. 1 Ky. Rev. L. 623.

² 5 Ves. 680.

³ 1 Cruise, 358. *Wiggins*, 1 Hill's Cha. 354. *Campbell v. Pennsylvania, &c.* 2 Whart. 53. *Whelpdale v. Cookson*, 1 Ves. 9. 5 Ves. 678. *Bruch v. Lantz*, 2 Rawle, 392.

⁴ *Killick v. Flexney*, 4 Bro. R. 161.

⁵ *Whichcote v. Lawrence*, 3 Ves. jr. 740. *Hayward v. Ellis*, 13 Pick. 272.

⁶ *McCants v. Bee*, 1 McCord's Cha. 383.

56. An administrator purchases land sold upon a judgment in favor of his intestate. Held, he took it in trust.¹

57. So, if an executor purchase the land of his testator at sheriff's sale, recede from his purchase, and the land is resold, he is chargeable for the highest price.²

58. An attorney, employed to collect or foreclose a mortgage, takes a conveyance to himself of the equity, instead of foreclosing. Held, the estate was subject to the trust in the hands of his heirs; and that they were bound to reconvey, on payment of the amount paid for the equity, and of the trustee's claim for his services, together with the value of improvements made by themselves before notice of the trust.³

59. Executors, having authority to sell, sold with the intent of repurchasing the estate from the purchaser. Held, the sale was voidable.⁴

60. Devise of land mortgaged, and a direction to the executors to redeem the mortgage. Though having assets, the executors took an assignment of the mortgage. Held, they should hold it in trust for the devisee, whose right, it seems, would be barred only by the lapse of twenty years.⁵

61. Land was sold upon execution. The plaintiff directed his attorney, A, to bid off the land. A confessed that he had done so, and said that the deed would be made to the plaintiff, and that he had made a *temporary* sale, to save the expense of advertising, and would receipt the execution, when paid. The sale was made on a stormy day, and only A and the officer were present. A purchased the land, and afterwards conveyed to B, who had notice of the facts. The land was worth \$2000, while only \$80 was due on the execution. Held, that it was doubtful whether the plaintiff's attorney could, in any case, legally purchase land sold on execution, inasmuch as he has the whole control of the proceedings, and therefore great opportunity for unfairness; and that in this case the judgment debtor might redeem, on payment of the sum due upon the execution and interest, the amount paid to discharge incumbrances by A or B, and the cost of improvements made by the latter.⁶

62. A trustee agreed to purchase a farm for the cestui from the proceeds of trust property. He bought the farm, and gave a bond and mortgage for the purchase money, but refused to pay them when due, and procured a foreclosure and sale by the mortgagee, at a loss of \$4000. Held, he was liable for the loss.⁷

63. One of several remaindermen purchased the particular estate, avowedly for all. Held, a trust for the others.⁸

¹ 4 Cow. 682.

² Giddings v. Eastman, 5 Paige, 561.

³ Den v. McKnight, 6 Halst. 385.

⁴ Jenison v. Hapgood, 7 Pick. 1.

⁵ Green v. Winter, 1 John. Cha. 27.

⁶ 2 Bin. 294.

⁷ Howell v. Baker, 4 John. Cha. 118.

⁸ Anderson v. Bacon, 1 Mar. 51.

64. The cestui que trust "must not lie by to speculate upon events," but disaffirm the sale in a reasonable time ; and what is reasonable time, depends on the circumstances of each case. The sale is not void, but only voidable at his election ; and, the rule being adopted solely for his benefit, neither strangers, nor parties to the deed, nor those claiming under them, can raise the objection, nor will the deed be set aside on application by or on behalf of the trustee himself.

65. Upon the filing of a bill in Chancery, to obtain a resale of the premises, it will be referred to the Master to settle whether such resale would be beneficial to the plaintiff.¹

66. Where there are joint trustees, a sale of the trust property by one to another is illegal ; and the latter is liable for any neglect on the part of the former to pay over the purchase money, or apply it to the purposes of the trust. The purchaser is also answerable for all profits arising from the property.²

67. But where an heir or devisee, being one of several, becomes constructively charged with a trust, but, having no notice of it, purchases the shares of the others, he shall hold the latter discharged of the trust, though his own share remains charged.³

68. Although a purchase by the trustee of the trust property is a transaction of great hazard and delicacy, to be watched with the utmost diligence, yet such purchase may be valid, provided it appears, after the most careful investigation, that there was a distinct and clear contract understood by the cestui ; and that on the part of the trustee their was neither fraud, concealment, nor any advantage taken of his situation as such.

69. Thus, where a trustee for payment of debts purchased the estate as agent for his father, both being creditors and partners, and the cestui had full knowledge, and took the sole management of the sale, making surveys, settling the particulars, prices, &c. Held, the purchase was good.⁴

70. So, a trustee may validly purchase directly from the cestui, provided he practise no unfairness. By such a contract he in fact removes himself from the character of a trustee.⁵ And after the trust ceases, the trustee may always make a valid purchase.

71. A mortgages land for security to B, his surety. A then transfers to C, a creditor, all his remaining interest in the land, without the knowledge and not for the account of B, and afterwards transfers such

¹ *Campbell v. Walker*, 5 Ves. 678. 13 Pick. 31. 6 Halst. 385. 5 Har. & J. 147.
² *Barb. Dig.* 486. 6 Ves. 625.

³ *Ringgold v. Same*, 1 Har. & Gill. 11. *Hulbert v. Grant*, 4 Mon. 582. *Case v. Abeel*, 1 Paige, 393.

⁴ *Giddings v. Eastman*, 5 Paige, 561.

⁵ *Coles v. Trecothick*, 9 Ves. 234. *Morse v. Royal*, 12 Ves. 355. *Naylor v. Winch*, 1 Sim. & Stu. 555. *McCants v. Bee*, 1 M'Cord's Cha. 389.

⁶ 13 Ves. 601.

interest to B. Held, in the absence of all fraud, B's purchase was not invalid, as made by a trustee ; for, by A's transfer to C, he had ceased to stand in that relation.¹

72. The rule against a trustee's purchasing does not prevent him from *occupying*.²

73. Where one trustee refuses to accept the trust, it is usual for him to *disclaim* by deed, or release all his interest to the others. A *release* implies a prior acceptance, and therefore cannot affect such duties as are founded in personal confidence. Thus, notwithstanding such release, the trustee must still join in a receipt for purchase-money, if the will required that all should sign it.³

74. After accepting and entering upon the execution of a trust, the trustee cannot surrender it without the assent of the cestui or order of Court.⁴

75. A trustee cannot delegate his power, as, for instance, a power to sell.⁵

76. In North Carolina, it is provided, that where several executors are appointed in trust to sell lands, if some of them refuse administration, the others may give a valid deed. A similar provision is made in Pennsylvania, where an executor has died, renounced, or been discharged ; and, in Illinois, where one of the executors, empowered to sell, dies. In Kentucky, it is held, that where a mere discretionary power to sell lands is given to several executors, they have a *power* without an *interest*, and one cannot sell alone, though the rest do not qualify. But a devise to executors to sell, for payment of debts, gives them an interest.⁶

77. In New York, upon the refusal of one trustee to accept the trust, the whole estate vests in the others, as if the former were dead, or had not been named. And, if one refuse to accept, and formally renounce the trust, the Court of Chancery has no authority to reinstate him, even with his consent, and on application of another trustee.⁷

78. If a trustee refuses to accept the trust, the Court of Chancery will either appoint a new one, assume the execution of the trust itself, or direct a release to other trustees, if there are such, who are willing to accept the office.⁸

79. A Court of Chancery may also, in some cases, remove a trustee from office, though he is willing to act. As where his co-trustees refuse to join with him. So, where a female trustee marries a for-

¹ Ball v. Carew, 13 Pick. 23.

² 15 Pick. 496.

³ 4 Ves. 97.

⁴ Sheperd v. M'Evers, 4 John. Ch. 136.

⁵ Hawley v. James, 5 Paige, 318.

⁶ 1 N. C. Rev. St. 281. Par. Dig. 301-2. Illin. Rev. L. 641. Woodridge v. Watkins, 3 Bibb. 349. Baird v. Rowan, 1 Mar. 215.

⁷ King v. Donnelly, 5 Paige, 46. Schoonhoven, Ib. 559.

⁸ 2 Brev. Dig. 306. 4 Des. Ch. 454. 6 Bin. 192. 2 Des. 375. Travell v. Danvers, Finch, 380.

eigner, though she expressly disclaim all intention of going abroad. And it is said, there is great inconvenience in a married woman's being trustee.¹

80. It is usual to provide expressly in trust deeds, that if any of the trustees die, become incapable of acting, or wish to relinquish the trust, a new trustee shall be appointed, either by the others or by the cestui, and the property conveyed to him jointly with the rest. Where there is no such clause, the Court of Chancery will appoint a new trustee, after a release from the former one. This may be done upon a bill filed against the remaining trustees, and by reference to the Master.² And Chancery will appoint a new trustee, notwithstanding by the will creating the trust such appointment seems to be confided to the original trustee.³

81. In Kentucky, where there is a devise to two in trust, without mentioning *the survivor*, upon the death of one, one half of the trust estate passes to his heirs. So a trustee may devise his estate, and, if the devisee renounce, the trust will pass to the heirs.⁴

82. All persons are capable of being trustees. In England, the king, who cannot be seised to a use, may be a trustee, and the remedy against him is in the Exchequer. So, in this country, a State may be a trustee, (see p. 207). So a corporation may hold in trust for its own members or others, and is subject to the jurisdiction of Chancery.⁵

83. A trust, once created, is said to fasten itself on the estate. Chancery never wants a trustee. Hence, when the trustee dies or becomes incapable of acting, the Court will provide for the continuation of the trust, by compelling the legal owner of the estate to perform it. So also, where no trustee is appointed, if the object of the grant or devise cannot be otherwise effected, the Court will appoint or imply a trustee. Thus, where land is devised upon certain trusts, to a company which is incapable of taking it, the heir at law of the testator shall be held a trustee. So, where land is devised to a married woman, for her separate use, her husband shall be a trustee for her. And the same has been held in Tennessee, in the gift of a slave to a woman and the heirs of her body. Generally it may be stated, that where property has been bequeathed in trust, without the appointment of a trustee, if it is personal estate, the personal representative is deemed the trustee: and if real estate, the heir or devisee.⁶

¹ Uvedale v. Ettrick, 2 Cha. Ca. 20. Lake v. Delambert, 4 Ves. 592-5.

² Buchanan v. Hamilton, 5 Ves. 722.

³ Dunscomb v. Dunscomb, 2 Hen. & M. 11.

⁴ Sanders v. Morrison, 7 Mon. 56. Waggener v. Waggener, 3 Mon. 545.

⁵ 1 Ves. 453. 3 Comm. 438. Mayor of Coventry v. Att'y. Gen. 7 Bro. Parl. Cas. 235. 2 Ves. jun. 46. 1 Ves. 468. 1 Cruise, 322.

⁶ 2 Story, 241. Harkins v. Coalter, 2 Porter, 463. Sonley v. Clockmaker's Co. 1 Bro. R. 81. Rogers v. Ross, 4 John. Ch. 388. Bennet v. Davis, 2 P. Wms. 316. Hamilton v. Bishop, 8 Yerg. 33.

84. But though a trust will not be suffered to fail for want of a trustee; yet, it is said, that being an *incident* merely, it will be suspended or destroyed by the suspension or destruction of the legal estate, as by escheat, disseisin, &c. But, it has been held, that where the estate of the trustee devolves upon the State by escheat, the State holds, subject to the trust.¹

85. On the other hand, if all the purposes of a trust, as to any share of the property, cease, or are illegal, the estate of the trustees ceases *pro tanto*.²

CHAPTER XXVI.

TRUST TERMS. TRUSTS IN NEW YORK.

1. Trust terms.

9. Trusts in New York.

1. *TERMS* for years are either vested in trustees *for the use of particular persons, or for particular purposes*; or else upon trust, *to attend the inheritance*.

2. Those of the former class are called terms *in gross*. The cestui que trust of such a term is entitled to the rents and profits, and may also demand an assignment of the term to himself. His estate is transferable; passes to his executors and administrators; and is equitable, though not legal assets, not being within the Statute of Frauds. The husband of a female cestui has the same interest as in any other term.

3. Terms *attendant on the inheritance*, though constituting a title equally intricate and important in the English law, are practically almost unknown in the United States, and therefore demand only a very brief notice.

4. The attendancy of terms is *the creation of a Court of Equity*, invented partly to *protect* real property, and partly to *keep it in the right channel*.

5. If a term has been created for a particular purpose, which is satisfied, and the instrument does not provide for a *cesser* of the term, on the happening of that event, the beneficial interest in it becomes a

¹ Benzein v. Lenoir, Dev. Eq. 225. Marshall v. Lovelass, Cam. & Nor. 217.

² Lorillard v. Coster, 5 Paige, 173.

creature of Equity, to be disposed of and moulded according to the equitable interests of all persons having claims upon the inheritance. When the purposes of the trust are satisfied, the ownership of the term belongs, in equity, to the owner of the inheritance, whether declared by the original conveyance to attend it or not. The trustee will hold the term for equitable incumbrancers, according to priority; and it is a general rule, that in all cases, where the term and the freehold would, if legal estates, merge, by being vested in the same person, the term will, in equity, be construed to be attendant on the inheritance, unless there be evidence of an intention to sever them.

6. If a *bona fide* purchaser happen to take a defective conveyance, he may remedy the defect, and perfect his equitable title, by taking an assignment of an outstanding term, which will give him priority over the intermediate legal estate.

7. As a conveyance of the legal estate in fee of a trustee may be often presumed, so in many cases the surrender of a trust term may be presumed.

8. The equitable interest in a term attendant, devolves in the same channel, and is governed by the same rules, as the inheritance. The term becomes consolidated with the inheritance, and follows it in its descent or alienation. On the death of the ancestor, it vests technically in his personal representatives, but in Equity it goes to the heir. It must be devised with all the formalities of real estate.¹*

9. By the New York Revised Statutes, uses and trusts are abolished, except as therein authorized and modified; and every estate and interest in land converted into a legal right, with the same exception.²

10. In relation to trusts, these statutes abolish passive trusts, where the trustee has only a naked and formal title, and vest the whole beneficial interest, or right in Equity to the possession and profits, in the cestui que trust. The latter takes a legal, corresponding with his beneficial interest; and no estate or interest vests in the trustee.³

11. Trusts are confined to two classes. 1. Trusts arising or resulting by implication of law. But the payment of the purchase money by one man, for land conveyed to another, creates no trust in favor of the former,† except in relation to his creditors existing at the time; and excepting also a conveyance made to the former without the consent of the latter, or in violation of some trust. But no re-

¹ 4 Kent, 86-94. 1 Cruise, 334 & seq.

² 4 Kent, 294.

³ 4 Kent, 303. *Cushney v. Henry*, 4 Paige, 345.

* I have been able to find no case in the American Reports, upon the subject of attendant terms. I am informed by one of the counsel in a late case in Massachusetts, (*Salisbury v. Bigelow*, S. J. C. March, 1838,) that the subject is there much discussed—probably, by way of analogy and illustration merely.

† But see *Ross v. Hegeman*, 2 Edw. Chan. 373, that where there is a joint advance of money upon a purchase by two in the name of one, a trust results to the other, though he did not pay the money till after completion of the purchase.

sulting trust is valid against a purchaser for valuable consideration, without notice. 2. Certain classes of *active* or *express* trusts, where the trustee is clothed with some actual power of disposition or management, which requires a legal estate and actual possession. Express trusts are allowed—(1.) To sell lands for the benefit of creditors; (2.) To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon. (3.) To receive rents and profits, and apply them to the support and education of any person; or to accumulate them for the purposes and within the limits mentioned. In these cases, the trustee takes the whole estate in law and equity, subject only to the execution of the trusts. If an express trust is created for any other purpose, no estate vests in the trustee; but if the act authorized is lawful *under a power*, the trust is valid as *a power in trust*. Every estate and interest, not embraced in an express trust, and not otherwise disposed of, remains in or reverts to the person who created the trust, and he may dispose of the lands, subject to the trust, or in the event of its failure or termination; and the grantee or devisee will have a legal estate, as against all persons but the trustee. The conveyance to the trustee must contain a declaration of the trust; otherwise it will be absolute against subsequent creditors of, or purchasers from, the trustee without notice. When thus declared, any act of the trustee in contravention of the trust is void. Upon the death of all the trustees, the trust vests in the Court of Chancery, and does not pass to the representatives of the surviving trustee.¹

12. Where some of the trusts provided for are valid, and others invalid, the trustee will take a legal estate for the fulfilment of the former only, unless the whole are so blended together that it is impracticable to execute one without the other, in which case all will be void. And any subsequent limitation, which is invalid as creating a perpetuity, shall be deemed wholly void, in determining the validity of the legal estate itself, or other preceding trusts.²

13. An *annuity* is a *legacy* of several annual sums in gross; and, if payable from the rents and profits of land, a *charge* upon such land. Hence, an express trust, to lease lands and receive the rents, &c. for payment of such annuity, is valid under sec. 55 of the statute.³

14. In such case, there is a resulting trust in the surplus rents, &c. in favor of the person presumptively next entitled to the estate.⁴

15. Where certain property is to be invested in land, in trust to receive the rents and profits for the use of a *cestui que trust*, and the interest of the latter is inalienable (under the Rev. Statute, sect. 63), even the consent of the parties and of the Court of Chancery also will not authorize any act which is virtually an alienation. But if the

¹ 4 Kent, 303-4-5.

² *Hawley v. James*, 5 Paige, 318.

³ *Ibid.*

⁴ *Ibid.*

property is directed to be invested in lands in a certain place, the Court may authorize an investment in other lands, with the consent of parties, and may itself consent on behalf of infants.¹

16. A trust to receive rents and profits and *pay them over*, was a familiar one at common law ; but it is held not to be valid under the Revised Statutes. The phrase, used in describing the third class of express trusts, "apply them to the use," means that the trustee shall *provide means and pay debts*. He is to judge of the propriety of the expenditures, and has the whole legal and equitable estate. The cestui has no estate, but only a right to enforce the trust in Equity. This class of express trusts was intended for the cases of minors, *femes covert*, lunatics and spendthrifts.²

17. In order to receive rents and profits for the use of another, the trustee must have a legal title to the land. If such title is vested in the cestui himself, no valid *power in trust* can be reserved to the trustee.

18. A testator directed, that his property should be invested in lands, to be conveyed to his children, but in trust for their guardian to receive the rents and profits for their use, both during and after their minority, so long as he should think proper. Held, the trust was void under the Revised Statutes ; that the guardian took no estate as trustee, but could hold the fund only as guardian.³

19. A trust for the accumulation of rents, &c. or income, is invalid, unless it is for the sole benefit of an infant, and he to be paid absolutely on coming of age.⁴

¹ Wood v. Wood, 5 Paige, 596.

² Coster v. Lorillard, 1835, 4 Kent, 309, n.

³ Wood v. Wood, 5 Paige, 597.

⁴ Hawley v. James, 5 Paige, 318.

CHAPTER XXVII.

ESTATE ON CONDITION. NATURE AND KINDS OF CONDITIONS.

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| <ol style="list-style-type: none"> 1. Definition. 2. Implied or express. 4. Precedent or subsequent. 11. May belong to any estate. 12. Things executed and executory. 13. Must determine the whole estate. 15. To whom reserved. 18. Impossible conditions. 19. Illegal conditions. | <ol style="list-style-type: none"> 20. Repugnant conditions. 23. Cannot be made void by a change of the law. 25. Repugnant obligations. 28. Condition against assignment of lease. 38. Confession of judgment, whether a transfer. 40. For re-entry in case of insolvency. 41. In restraint of marriage. |
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1. A **CONDITION** is a qualification or restriction annexed to a conveyance, by which, upon the happening or not happening of a particular event, or the performance or non-performance of some act by the grantor or grantee; an estate shall commence, be enlarged, or be defeated.¹ Lord Mansfield remarked, that at common law the only modification of estates was by condition.²

2. A condition is either *implied* or *express*. Implied conditions are those created by law, and not by any express words; that is, *the legal incidents* of estates. For instance, at common law, a tenant for life held his estate upon the implied condition, that any attempt by him to convey in fee would be a forfeiture of his interest; and also upon the implied condition not to commit waste.³

3. Express conditions are those created by express words—as, for instance, a condition in a lease, that if the rent shall be not paid at the day, the lessor may re-enter.⁴

4. Conditions are either *precedent* or *subsequent*; the former must be performed before the estate will vest, the latter enlarge or defeat an estate already created.

5. Whether a condition shall be regarded as precedent or subsequent, depends not on any form or location of words, but on the fair construction of the contract and plain intention of the parties.⁵

6. If, in case of a will, the particular clause in question, or the whole will, indicates that the condition must be performed before the estate can vest, the condition is precedent. If the act prescribed does

¹ 2 Cruise, 4.

² Co. Lit. 233 b.

³ Thorp v. Thorp, 12 Mod. 464. Newkerk v. Same, 2 Caines, 352. Barruso v. Madan, 2 John. 148. Brockenbrough v. Ward, 4 Rand. 352. Green v. Thomas, 2 Fairf. 318. 3 Pet. 374. Tompkins v. Elliot, 5 Wend. 496.

⁴ 3 B. & P. 654 n.

⁵ Lit. 328.

not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent.¹

7. Where covenants go to the whole of the consideration on both sides, they are conditions precedent; where only to a part, otherwise, and each party must resort to his separate remedy, because the damages might be unequal.²

8. Conveyance in fee, reserving a life estate in a part of the land. "This deed is made and to have effect on the following conditions;" viz. payment of money at divers times to several persons. The fee passes, upon condition subsequent.³

9. A testator gave a large amount of lands to his wife for life, and all his real estate *at her death* to A, on condition of his marrying a daughter of B and C. Held, the words, being *in presenti*, "I give," &c. imported an immediate interest; that, in regard to the portion devised to the wife, inasmuch as B and C had no child at the making of the will, the testator evidently did not contemplate that A would marry according to the condition during the life of the wife, and therefore intended that he should take at her death, whether he had thus married or not; that there was no ground for any distinction, with respect to the condition, between this and the other part of the estate; and therefore that the devise of the whole was on condition subsequent, and took effect immediately, subject, as to a part of the land, to the wife's possession for life.⁴ It would have been otherwise, it seems, if the devise had been, "I devise my land to A, *on his marrying B*."⁵

10. There is one case, where the distinction between conditions precedent and subsequent becomes very important, the same event producing, in the two cases, directly opposite effects. It will be seen, that if a precedent condition becomes impossible by act of God, no estate can vest; whereas, if the condition is a subsequent one, the estate becomes absolute.⁶

11. A condition may be annexed to any estate in land whatsoever.

12. It is said, that, as to things *executed*, a condition must be created and annexed to the estate at the time of making it. Hence, when a condition is made by a separate deed, this must be sealed and delivered at the same time as the principal deed. This point arose in the reign of Edward III., who, having conveyed lands to certain noblemen, attempted subsequently to annex a condition to such conveyance. But the condition was held void by all the judges and sergeants.⁷ But things *executory*, such as rents, annuities, &c., may be restrained by conditions, annexed to them after their creation.⁸

¹ 3 Pet. 374.

² Howard v. Turner, 6 Greenl. 106.

³ lb. 375.

⁴ Co. Lit. 236 b. Touch. 126. 2 Cruise, 5.

⁵ This distinction seems to be, now of no practical importance, however well

⁶ Boone v. Eyre, 1 H. Black. 273 n.

⁷ Finley v. King, 3 Pet. 374.

⁸ Infra ch. 28, s. 15.

⁹ Co. Lit. 237 a.

13. A condition must *determine the whole estate* to which it is annexed. Thus, if a feoffment is made, on condition that, upon the happening of a certain event, the feoffor may re-enter and hold *for a time*, or the estate shall be void *for a part of the time*; or if a lease be made for ten years, on condition that in a certain event it shall be void *for five*; these conditions are void. But a condition may legally be confined to *a portion of the land* which is conveyed. Thus there may be a conveyance of six acres, with a condition that upon a certain event it shall be void as to three.¹ So also in case of a lease, it has been seen that there may be a condition for the lessor to re-enter for non-payment of rent, and *hold till he is satisfied*.²

14. Conveyance of an estate tail, conditioned to be void in a certain event, as if the tenant in tail were dead. Held, inasmuch as the death of the tenant would not terminate the estate, but only his death without issue; this condition was void.³

15. A condition can be reserved only to the grantor or lessor, or his heirs, not to a third person. This rule is founded upon the general principle of law, which forbids *maintenance* or the purchase of disputed titles. But heirs shall have the benefit of a condition, though not specially named.⁴

16. Upon the principle above stated, at common law, a condition in a lease, of re-entry upon non-payment of rent, did not pass to an assignee of the reversion, even though the tenant attorned to him. This rule, however, is changed by statute.⁵

17. There are many circumstances which may render a condition void.

18. *Impossible conditions** are void. So those which become impossible by the act of the grantor. Thus, where the King of Great Britain granted a charter of a town in Vermont (then New Hampshire), in part to the defendants, an incorporated society, reserving a rent of one shilling for every hundred acres, after the first ten years, *to be paid annually to the grantor in his council chamber in Portsmouth*, or to such officer as should be appointed to receive it; held, the separation of the two countries, an act of the grantor, rendered impossible a payment at the place named; and no other place having been appointed, nor any officer to receive it, the people of Vermont, as successors to the King, could not claim a forfeiture.⁶

founded in the technical rules of the ancient common law. *Things executed* may undoubtedly be modified, subsequently to their creation, by the consent of *both parties*; and *things executory* cannot be, without such consent.

¹ 1 Rep. 86 b.

² P. 156.

³ *Jermyn v. Arscott*, 1 Rep. 85. 6, 40.

⁴ *Jackson v. Topping*, 1 Wend. 388.

⁵ Lit. s. 347.

⁶ *People, &c. v. Soc'y. for Propagating Gospel*, 1 Paine, 652.

* "Impossible conditions mean a *physical impossibility*, and not the want of power in the party." 1 Swift, 93.

19. *Illegal* conditions are void. These are—1. To do something that is *malum in se* or *malum prohibitum*. 2. To omit some duty. 3. To encourage such act or omission.¹

20. It is said, that a condition is a *divided clause* from the grant, and therefore cannot either expressly or by implication frustrate the grant in regard to any of its inseparable incidents. Hence, conditions repugnant to the nature of the estate are void. As, for instance, a condition in a conveyance in fee, that the grantee shall not take the profits or alienate, or a condition in a lease to three persons, that one of them shall not demand the profits or enter upon the land during the lives of the others. Or a condition, annexed to an estate tail, that the donee shall not marry; because without marriage he could not have an heir of his body; or that he shall not suffer a recovery.²

21. So a condition annexed to a devise to children, in these words—“in case they continued to inhabit the town of H, otherwise not.” In this case, only one of the devisees lived at H at the date of the will or the death of the testator. The word *continue* was therefore held unmeaning. Another ground was, that the devisees being themselves heirs at law, there was no one to take advantage of a breach of condition; inasmuch as the residuary devise to two sons of the testator, expressly excepted this portion of the estate. The devise was declared repugnant, unreasonable, uncertain and nugatory. But Thompson J. dissented, on the ground that the condition was a precedent one.³

22. But conditions prohibiting only what is contrary to the law, are valid. Thus, a condition against alienation in *mortmain*, or against alienation in any mode which is invalid in law. And a condition against the exercise of a power, which is not *incident* to the estate granted, but only *collateral*, and conferred by a special statute, is valid; as, for instance, a condition in a gift in tail, that the donee shall not lease for three lives or twenty-one years, as authorized by Statute 32 Henry VIII.⁴

23. A condition, valid at the time of creating it, cannot be affected by any change in the law pertaining to it.

24. Conveyance, on condition the grantee shall not aliene, till he reaches the age of twenty-five years. Before this time he alienes, and makes a second conveyance after reaching the age prescribed. The first deed is void, and the last valid. When this condition was imposed, twenty-five was the age of majority in this State (Missouri). A subsequent act changed it to twenty-one. Held, the condition was still binding.⁵

¹ 1 P. Wms. 189.

² Lit. 360-1. Hob. 170. 8 T. R. 61. Co. Lit. 206 b, 223 a. Moore v. Savil, 2 Leon. 132. Jenk. 243. Dyer, 343 b. Co. Lit. 223 b.

³ Newkerk v. Newkerk, 2 Caines, 345.

⁴ 2 Cruise, 7. (Gray v. Blanchard, 8 Pick. 289).

⁵ Dougall v. Fryer, 3 Miss. 40.

25. It was formerly held, that a bond, against exercising the powers incident to an estate, is valid. Thus, where a son, receiving lands from his father in tail, gave bond that he would not dock the entail; and afterwards applied to Chancery for relief against the bond; held, it was a valid instrument.¹

26. But this doctrine is said to be extremely questionable, and has been denied in subsequent cases.²

27. Thus, where successive tenants in tail, according to the direction of the donor, entered into mutual obligations not to aliene; held, in Chancery, and by the advice of Lord Coke, that as these agreements tended to a perpetuity, they should be delivered up to be cancelled. The same decree was made in case of a bond from a tenant in tail not to commit waste.³

28. In regard to estates for life and for years, it has been held, that if a lease is made to one *and his assigns*, a condition against assignment is repugnant and void. But where assigns are not named, such condition is valid, though not favored, but looked nearly into by the Courts.⁴ As a general principle, the landlord having the *jus disponendi*, may annex whatever condition he pleases to his grant, provided it is not illegal, unreasonable or against public policy. It is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate. It is a matter of personal confidence, founded on a knowledge of the tenant's honesty or skill and diligence in farming.⁵

29. Lease for years, on condition the lessee, his executors or assigns should not aliene, without the lessor's consent. After the lessee's death, his administrator assigned without leave of the lessor. Held, as the administrator was an assignee in law, this was a breach of the condition.⁶

30. So a condition, that if the lessee for years, his executors or assigns demised the land for more than from year to year, the lease should cease, was held valid, and to be broken by a devise of the term.⁷

31. But it was subsequently decided, that where a lessee covenanted not to assign his term without consent, a devise was no breach.⁸

32. A condition against assignment, either by the lessee or his assigns, without the lessor's consent, is waived and put an end to by an assignment with his consent; so that a subsequent assignment by the first assignee is valid, and not within the condition.⁹

¹ Co. Lit. 206 b. *Freeman v. Freeman*, 2 Vern. 233.

² 2 Cruise, 7.

³ Poole's case, Moo. 810. *Jervis v. Bruton*, 2 Vern. 251.

⁴ Hob. 170. Co. Lit. 204 a. 223 b. 3 Wils. 237.

⁵ Roe v. Galliers, 2 T. R. 138-40.

⁶ More's case, Cro. Eliz. 26. (*Pennant's case*, 3 Rep. 64).

⁷ *Berry v. Taunton*, Cro. Eliz. 331. ⁸ *Fox v. Swann*, Styles, 483.

⁹ *Dumport's case*, 4 Rep. 119. (*Whitchot v. Fox*, Cro. Jac. 398).

33. An *underlease* is not within a condition against assigning over the lessee's estate. So held, where a lessee for twenty-one years, covenanted "not to assign, transfer or set over, or otherwise do or put away the said indenture of demise, or the premises thereby demised or any part thereof, to any person or persons whomsoever, without the license and consent of the lessor;" and afterwards leased for fourteen years.¹

34. But a proviso, that the lessee shall not *let, set or assign over* the premises or any part thereof, embraces an underlease.²

35. Where a lease is made expressly to the lessee, his executors, &c., with a proviso against his or their assigning or letting without consent, the proviso extends to an underlease by the administrator of the lessee. The term, for the purposes of assignment, is not legal assets. If the proviso applied in its terms only to the lessee himself, it might be held not to embrace a transfer by the administrator.³

36. Where the condition requires consent in writing, a parol consent will not destroy it.⁴

37. A consent by the lessor to a transfer of a part of the premises, is, it seems, a waiver of the condition as to the whole.⁵

38. Where there is a condition against any transfer of the lessee's estate, if he confess a judgment, through a warrant of attorney, upon which execution is taken out and levied upon the term, this is no breach of the condition, but the term will pass to an execution purchaser, even with notice of the proviso. A judgment is held to be "in invitum;" and the case is merely that of a fair creditor using due diligence to enforce the payment of a just debt.⁶

39. But in a new action between the same parties, the verdict found that "the warrant of attorney was executed for the express purpose of getting possession of the lease," in which purpose the tenant concurred; and it was held that the lease was forfeited. Lord Kenyon remarked—"it would be ridiculous to suppose that a court of justice could not see through such a flimsy pretext as this. Here the maxim applies, that which cannot be done *per directum* shall not be done *per obliquum*. The tenant could not by any assignment, underlease or mortgage, have conveyed his interest to a creditor. Consequently, he cannot convey it by an attempt of this kind."⁷

40. A condition, that the lessor may re-enter in case of bankruptcy on the part of the lessee, has been held valid. It was objected, that such a principle would enable the lessee to hold out false colors to the world, and that the condition was equivalent to a proviso, that the lease, though absolutely granted, should not be seised under a com-

¹ *Crusoe v. Bugby*, 3 Wils. 234. ² Bl. R. 766.

³ *Roe v. Harrison*, 2 T. R. 425.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Doe v. Carter*, 8 T. R. 57.

⁸ 8 T. R. 300-1.

mission of bankruptcy. But the Court held, that there was the same reason for making this provision as for providing against voluntary assignments; that there was even more danger that the estate would fall into bad hands in the latter case than in the former; that public policy favored the security of landlords; that the mere possession of land was no proof of ownership, but a creditor was bound to look into the lease if he would ascertain the title, and that, although if the lease were granted absolutely, such proviso would be void for repugnancy, yet here there was an express limitation to terminate the estate upon the lessee's becoming bankrupt, a stipulation against his own act. The case was compared to that of a lease for twenty-one years, on condition that the tenant should continue to occupy personally, which would be a valid proviso. It was also suggested, that such a condition, in a very long lease, would be liable to the objection of creating a perpetuity.¹

41. It is the doctrine of the ecclesiastical Court and Court of Chancery in England, derived from the civil law, that conditions in restraint of marriage, annexed to bequests of personal property, are void as against public policy, except where there is a devise over upon breach of condition. But such conditions, annexed to devises of real estate, have generally been held valid, whether they were precedent or subsequent. It is said, there can be but one true legal construction of these conditions, and therefore it must be the same in the Court of Chancery, and all the other courts in Westminster Hall. The meaning of the testator, or the control which the law puts upon his meaning, cannot vary, in what court soever the question chances to be determined.²

42. This rule, however, seems applicable only to a *general* restraint of marriage; not to such conditions as merely prescribe provident regulations and sanctions; as, for instance, in regard to time, place, age, or person, the consent of other parties, due ceremonies, &c.—unless such condition is used evasively for the purpose of general restraint.³

43. Devise to the testator's wife for life; then to his grand-daughter, A, in tail, provided, and upon condition, that she married with consent of the wife of B, and C; and, if she married without consent, devise to D. A married without consent. The Master of the Rolls held the condition as "in terrorem"* and void; but the decree was reversed on appeal.⁴

44. Devise to trustees and their heirs, in trust for A for life, if within three years she should marry B; if not, devise to C. Upon the

¹ *Roe v. Galliers*, 2 T. R. 133. (See 5 Pick. 522).

² Per *Ld. Mansfield*, 4 Burr. 2056.

³ *Scott v. Tyler*, 1 Har. Jud. Argu. 22.

⁴ *Fry v. Porter*, 1 Cha. Ca. 138. 1 Mod. 300.

* *Ld. Mansfield* shrewdly remarked upon this phrase, that a clause can carry very little terror, which is adjudged to be of no effect. 4 Burr. 2055.

death of the testator, the friends of A made proposals for her to B, which he declined, and A then married D. Held, in the Court of Chancery, that this was a good condition precedent, without performance of which A could gain no title; and one which, in its nature, admitted of no pecuniary compensation. But this decree was reversed in the House of Lords.¹

45. Such a condition has also been held valid, when annexed to a devise of money charged upon and to be raised from land; and in the case of a trust term, created for the purpose of raising portions for daughters, which arise out of land, are not subject to the ecclesiastical jurisdiction, but are governed wholly by the common law.²

46. A settled his estate to the use of himself for life, remainder to trustees for a term of years, upon trust, to raise £2,000 for each of his daughters, if they married with their mother's consent; and if either of them died before marrying with consent, her portion to cease, and the premises to be discharged; or if raised, to be paid to the owner of the premises. A gave to his daughters, by will, an additional £2,000 each, on the same condition. Having married without the consent of their mother, but both they and their husbands knowing of the condition, the daughters filed a bill in equity against the trustees and executors, to have their portions raised. Sir Joseph Jekyll decreed, that the conditions were void. Upon appeal, Lord Hardwicke, aided by Lord Chief Justices Willes and Lee, and Lord Baron Comyns, reversed the former judgment. The chief grounds of decision were, that the restraint was a condition precedent, till the performance of which, no estate could vest; or else a limitation of the time of payment, which, in this case, never arrived; that the condition was neither repugnant, impossible, nor *malum in se*, the only conditions to be rejected; that although, where a compensation was possible, there was no material distinction between conditions precedent and subsequent, yet in this case, which did not allow compensation, a much clearer intent, expressed by a devise over, would be required to divest an estate once created, than to prevent the vesting of the estate; and that the direction to have the estate exonerated was equivalent to a devise over.³

47. But where lands are charged only as auxiliary to personal estate, such condition is invalid. A testatrix gave to her daughter a sum of money, provided she should marry with the written consent of trustees given before marriage, and not otherwise, and charged all her real estate with debts and legacies. The daughter married without consent, but this was obtained after marriage. Held, the devise took effect.⁴

¹ *Bartie v. Falkland*, 3 Cha. Ca. 129. 16 Jour. 230-36-38-40-1.

² *Reves v. Herne*, 5 Vin. Abr. 343.

³ *Harvey v. Aston*, 1 Atk. 361. Com. R. 726. Willes, 83.

⁴ *Reyniah v. Martin*, 3 Atk. 330.

48. A condition restraining a female from marrying a Scotchman was held good.¹

49. Conditions of this kind, however, being in the nature of *penalties* or *forfeitures*, are construed strictly in favor of the devisee. If the substantial part and intent be performed, equity will supply small defects and circumstances. They are said to be odious and contrary to sound policy.²

50. Devise to trustees in trust for the testator's daughter, A, till her marriage or death; if she should marry with their consent, then to her and her heirs; if without their consent, to the sisters of A. There were also other devises to A and her sisters. A married during her father's life with his consent and approval, and he settled upon the marriage a part of the property devised to her. Held, such marriage was a waiver of the condition, and made the devise absolute; and that to treat the estate as forfeited would defeat the manifest intention, because it would pass not to the other sisters, but to the heirs at law.³

51. So, where the condition was, that the devisee should marry the testator's granddaughter; held, an offer of marriage and a refusal on her part were a waiver of the condition.⁴

52. Devise to trustees to the use of the testator's son, A, for life, remainder to his wife for life, remainder to A's first and other sons in tail; provided, if A should marry any woman not having a competent marriage portion, or without the trustees' consent, &c. in writing, under hand and seal, the trustees should hold, after A's death, to the use of the testator's daughters. The testator further declared, that the proviso was not meant or to be construed *in terrorem*, but a condition, for want of performance of which, in every respect, the estate should not vest in his son's wife, or the heirs of that marriage. A married a woman having a portion, but without the consent of the trustees, one of whom became one of the devisees in remainder. Lord Mansfield, in rendering judgment, remarked, that the forfeiture was so cruel as to begin with the innocent issue of the offender, who was to have the estate for his own life at all events; and that the testator considered money as the only qualification of a wife, but still meant to leave it to the judgment of trustees, whether there might not be some equivalent for money. It was accordingly held, that although the condition was undoubtedly a precedent one, yet it was to be taken in the alternative, there being a mere error in the penning; or was to be construed *and*; either a portion, or the consent of the trustees, fulfilled the condition; and such consent was probably withheld by one of them from self-interest.⁵

¹ *Perrin v. Lyon*, 9 E. 170.

² 4 Burr. 2052.

³ *Clark v. Luoy*, 5 Vin. Abr. 87.

⁴ *Robinson v. Comyns*, For. 164. *Daley v. Desbouverie*, 2 Atk. 261.

⁵ *Long v. Dennis*, 4 Burr. 2052.

53. Devise, on condition the devisee should marry with the consent of trustees ; if not, devise over. The trustees, being applied to, offered to agree if a proper settlement were made. The devisee married without their knowledge, and a proper settlement was afterwards made. Held, a good compliance with the condition.¹

54. Devise to A, on condition she married with the consent of B, in writing ; if not, devise over. A married without B's knowledge, but B consented as soon as he heard of it. Held, a fulfilment.²

55. A condition restraining a widow from marrying again is valid ; especially if there is a devise over.³*

CHAPTER XXVIII.

ESTATES ON CONDITION—PERFORMANCE, BREACH, DISCHARGE, ETC. OF CONDITIONS.

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| 1. Performance—conditions precedent and subsequent.
2. Performance as far as possible.
3. Copulative condition.
5. Who may perform.
9. When performed.
12. Place.
14. Who bound by.
15. Impossible conditions.
20. Refusal to accept performance, &c. | 23. Breach and forfeiture at law ; condition and covenant, &c.
28. Relief in Equity.
36. Breach, how taken advantage of.
42. Breach, who may take advantage of.
49. Effect of entry.
51. Waiver of condition.
53. Release of condition.
54. Accord and satisfaction.
55. Condition and limitation—distinction. |
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1. WITH regard to the performance of conditions, a distinction is made between conditions precedent and subsequent ; the former, which create an estate, are construed liberally, according to the intent ; the latter, which destroy an estate, are construed strictly.⁴

2. But where literal performance of a condition subsequent becomes impossible, it should be performed as nearly according to the limitation as practicable. Thus, if A convey to B on condition that B reconvey to A and his wife in tail, remainder to A's heirs, and before

¹ Daley v. Desbouverie, 2 Atk. 261.

² Fitchet v. Adams, 2 Stra. 1128.

³ Co. Lit. 219 b.

⁴ Bolton v. Humphries, 2 Cruise, 24.

* It is held in Massachusetts, that a devise to the testator's wife of an annuity, during her life and widowhood, is a devise on condition subsequent, subject by its terms to be defeated by the second marriage of the wife ; but that the condition is void as being merely in *terrorem*, there being no devise over except to the residuary legatee, who was the heir at law. 6 Mass. 169.

such reconveyance A die; B shall convey to the wife for life without impeachment of waste, remainder to A's heirs on her begotten; remainder to A's right heirs.¹

3. When a condition copulative, consisting of several branches, is made precedent to an estate, the entire condition must be performed, else the estate can never arise or take place.²

4. Thus, where a settlement provided that trustees should be seised of land to the use of A and his issue, if he should be married to B after the age of sixteen and they should have issue; and they were married before she was sixteen, she lived to that age, but died without issue; it having been decided that A took the estate, this decree was reversed in the House of Lords, a part of the condition not being fulfilled.³

5. The general rule is, that any person interested in the condition or the estate may perform the former. Thus, if a conveyance is made on condition the grantee shall pay a certain sum at a certain time; a grantee of such grantee may perform it.⁴

6. So also the heirs of a grantee may perform the condition, though not named, if a time is fixed for the performance. The possibility of performing the condition is an interest, right, or *scintilla juris* which descends to the heir.

7. Devise to A for life, remainder to B in fee; provided that if within three months from A's death, C should pay B, his executors, administrators, &c. a certain sum, the land should go to C and his heirs. C died during the life of A. Held that after A's death, the heir of C might perform the condition.⁵

8. But if no time is appointed for performance of the condition, the performance of it is a right personal to the party himself. Thus it is said, in case of a feoffment from A to B, upon condition, that if A pay B a certain sum, A and *his heirs* may enter; the heir cannot perform the condition. This principle, however, seems inconsistent with the modern law of mortgages, as will be seen hereafter.⁶

9. Where no time is fixed for performance, a condition shall be performed either during the life of the party who is to fulfil it, or in reasonable time, according to the circumstances of the case. Thus, where the condition is that the grantee shall pay a certain sum, he is bound to pay it in reasonable time, because he has the use of the land. But if the grantor is to regain the estate on payment of a certain sum; he has during his life to pay it; because until payment he cannot take possession.⁷ So, if one devise land to A, "on condition he shall marry B," the devise takes effect immediately, and the devisee has his life to perform the condition.⁸

¹ Lit. 352.

² Wood v. Southampton, 2 Freem. 186.

³ Co. Lit. 207 b.

⁴ Lit. 337.

⁵ Finlay v. King, 3 Pet. 376.

⁶ Com. R. 732.

Show. Parl. Ca. 83.

⁷ Marks v. Marks, 1 Ab. Eq. 106.

⁸ 2 And. 73.

10. The former of these rules is applicable, where an immediate performance by the grantee is necessary to effect the evident purpose of the grantor in making the conveyance.¹

11. Devise of lands to a town for a school-house, "provided it be built within one hundred rods of the place, where the meeting-house stands." Held this was a valid condition subsequent, and the vested estate was forfeited, and passed to the residuary devisee as a contingent interest, upon non-compliance with the condition in reasonable time.²

12. Where a certain *place* is appointed for performance of a condition, the party who is to perform must be at the place at the time appointed, and the other party is not bound to accept performance elsewhere. But if he does accept, the performance will be good.³

13. Where no place is appointed for performance, a grantee, who is to perform the condition, by payment of money, must seek for the other party, if he is in the realm (country); but not if he is abroad. If the condition is to deliver specific and cumbrous articles, such as wheat or timber, the grantee is not bound to seek the grantor, but the latter must go to the former and appoint a place of delivery.⁴

14. One who accepts an estate upon condition is absolutely bound to perform it, even though the performance be attended with a loss, and though the party be incapable of incurring a mere personal obligation. Thus, it seems, the acceptance of an estate charged with a charity, binds the party receiving it to fulfil the charity, though the rents prove insufficient.⁵ So, an infant heir or married woman is bound to perform a condition, which charges not the person, but the land. So, an infant mortgagee is bound by the condition. "The deed must be good in the whole, or void in the whole."⁶ So, where an infant agreed that a judgment with condition should be rendered in his favor, held, after coming of age he could not avail himself of the former without the latter.⁷

15. Where performance of a condition becomes *impossible* by act of God; if precedent, no estate vests; if subsequent, the estate becomes absolute.⁸

16. Devise to A, on condition of her marrying B when or before A was 21. B died before A refused or was requested to marry him. Held, the condition was excused.

17. Devise of land to A, "on condition of his marrying a daughter of B and C." B dies without having had a daughter. The con-

¹ Hamilton v. Elliott, 5 Ser. & R. 375.

² Hayden v. Stoughton, 5 Pick. 528.

³ 1 Rolle's Abr. 444.

⁴ Lit. 340. Co. Lit. 210 b. 3 Leon. 260.

⁵ Att'y. Gen. v. Christ's Hos. 3 Bro. Cha. 165.

⁶ Parker v. Lincoln, 12 Mass. 18. (15, 359.)

⁷ Lowry v. Drake, 1 Dana, 47.

⁸ Co. Lit. 206 a, 218 a. Thomas v. Howell, 1 Salk. 170.

dition being *subsequent*, and having become impossible, A's estate is absolute.¹

18. Where performance of a condition becomes impossible by the act of the party who imposed it, the estate is rendered absolute. A testator devised to A for life his estate at B, and also the income of certain other property while she should live and reside at B. He afterwards revoked the former devise. Held, A should hold the latter devise absolutely.²

19. Where a condition is double, and one part of it is possible at the time, and the other not, performance of the former is sufficient. And if the condition is disjunctive, giving an election to the party, and one part becomes impossible by act of God, the whole is excused. It seems, however, that this rule is subject to exceptions.³

20. Where the party who is to have the benefit of a condition, prevents or refuses to accept performance; or absents himself when he ought to be present; or neglects or disables himself to do the first act on his own part, as he was bound to do; the condition is discharged.⁴

21. Thus, a tender and refusal of a mortgage debt, discharges the land, though the debt remain.⁵

22. A and B mutually agreed that B would purchase a farm of A, and as a part of the consideration convey to A another farm of less value; and that all timber, trees, &c. upon each estate should be valued and paid for by them respectively; and unless A should be able to make a good title before a certain day, the agreement to be void. A cut down divers trees. In a suit for the penalty annexed to the agreement, held, A had disabled himself to perform his part of the agreement by this act; that such performance was a condition precedent, and therefore A could not maintain the present action.⁶

23. A court of law cannot relieve against a breach of condition, or restore the consideration paid by the party upon whom such breach operates as a forfeiture.

24. Thus, where one conveys land upon condition subsequent, which the grantee fails to perform, and the grantor enters for the breach; the grantee cannot recover back money paid by him as part of the consideration.⁷

25. But on the other hand, after such entry, the grantor cannot recover the balance of the price.⁸

26. A court of law, however, will sometimes construe that which is in form a *condition*, a breach of which forfeits the whole estate, into a *covenant*, on which only the actual damage sustained can be recovered.

¹ *Finlay v. King*, 3 Pet. 374.

² *Darley v. Langworthy*, 3 Bro. Parl. Cas. 359. (See p. 249).

³ *Wigley v. Blackwal*, Cro. Eliz. 780. *Laughter's case*, 5 Rep. 21. 1 Lord Ray.

279. *Da Costa v. Davis*, 1 B. & P. 242.

⁴ 2 Cruise, 33.

⁵ *Jackson v. Crafts*, 18 John. 110.

⁶ *St. Albans v. Shore*, 1 H. Bl. 270. *Hard v. Wadham*, 1 E. 619.

⁷ *Frost v. Frost*, 2 Fairf. 235.

⁸ *Ibid.*

Conditions and limitations are not readily to be raised by mere inference and argument. The words usually employed to create a condition, are *on condition*. But the phrases *so that*, *provided*, *if it shall happen*, are of the same import. *Provided always* may constitute a condition, limitation, or covenant, according to the circumstances.¹ *

27. But where the explicit words which denote a condition are used, they will not be construed into a covenant. One conveyed a house "*on condition* that no windows should be placed in the north wall within thirty years," and windows were made within that time ; it was held, that this could not be construed as a covenant, and the estate was wholly forfeited.²

28. Where a forfeiture has been incurred at law by breach of condition, a Court of Chancery will sometimes afford relief. It was formerly held that this could be done only where the condition is a subsequent one ; but it seems to be now settled, that in all cases a forfeiture shall not bind where a thing may be done after the time, or a compensation made for it, and where the breach resulted from inevitable accident. And Chancery will relieve even in favor of the heir of the party who was to have performed the condition, and after a recovery of the land at law by the heir from whom it was devised away on condition.³

29. A married woman, having a power to dispose of lands, devised them to her executors to pay £500 out of them to her son ; provided that if the father did not release certain goods to the executors, the devise of the money to be void, and to go to the executors. After the death of the testatrix, a release was tendered to the father, which he refused to sign. The son brings a bill in Equity against the executors and the father, and the father answered that he was then ready to release. It was decreed that the £500 should be paid.⁴

30. So, where one devises lands on condition to pay certain sums at specified times to his heir, and for non-payment of one of them the heir enters ; Chancery will restore the land on payment of the sum with interest.⁵

31. Even where land is devised on condition of paying a sum of money at a certain time, and upon non-payment devised over on the same condition ; Chancery will relieve.⁶

32. Devise to the two sons of the testator, "they jointly and severally paying to my two daughters \$300 each, within one year from my death." Held, this was not a *legacy*, but a *condition*, the breach

¹ 4 Kent, 131-2, and n. Doe v. Phillips, 9 Moore, 46.

² Gray v. Blanchard, 8 Pick. 284.

³ 4 Kent, 120. Popham v. Bampffield, 1 Vern. 83. Cage v. Russel, 2 Vern. 352. Barnardistone v. Fane, 2 Vern. 366. 4 Kent, 125.

⁴ Ibid.

⁵ Woodman v. Blake, 2 Vern. 222.

⁶ See further, *Covenant*.

of which forfeited the estate at law ; but also that Chancery would relieve, notwithstanding the effect of the disposition was to make an unequal distribution of the estate.¹ Hosmer J. seems to place the decision upon the ground that the condition was a *subsequent* one.²

33. But Chancery will not relieve against a breach of condition, in those cases where there is no rule for the measure of damages ; as, for instance, where a lease contains a condition against assignment, and the lessee violates this condition.³ Equity cannot control the lawful contracts of parties, or the law of the land.

34. In a late case Lord Eldon held, that relief could be granted only where the condition was to pay money ; and not where the breach consisted in a positive act directly in the face of the condition, as by assigning a lease without license, and the law had ascertained the contract and the rights of the parties.⁴

35. A covenanted in 1799 to convey to B certain land, being government land, "on B being at one half the expense, in land or otherwise, for procuring a title," &c. This condition was the sole consideration. A incurred the expenses in 1800, and gave notice to B in 1802, but B paid no regard to it till 1806. In the mean time, the value of the land increased tenfold. B brings a bill in Equity against A for specific performance. Held, the condition was a condition precedent, and upon various considerations Equity would not relieve. 1. B was not bound by any contract, and therefore if A had performed his part of the agreement, he would have had no remedy against B. 2. As the title to the land was in the Government, and a survey necessary, the expenses must necessarily be incurred ; and they must also be paid in *procuring* the title,—merely *reimbursing* might defeat the whole object. 3. Hence this condition was not intended as a *mere security*, and the breach was not a mere default *in time*, but it destroyed the *substance of the contract*. 4. The act provided for was to be done for the benefit of a third party, the owner of the land, and therefore the damage was not susceptible of compensation. 5. The word "expenses" included *time and labor*, which, from their very nature, could not be paid at any subsequent period.⁵

36. A breach of condition annexed to a freehold, can be taken advantage of by the grantor or his heir, only by means of an entry upon the land, or in some cases, a *claim*, which is equivalent to entry ; and it matters not whether there is any express provision for re-entry or not. In case of incorporeal or reversionary rights, a claim is the only practicable mode. Where there is a forfeiture to the government, an *office* is equivalent to entry.⁶ But the bringing of an action of dis-

¹ Wheeler v. Walker, 2 Conn. 196-209.

² Ibid. 301.

³ Wafer v. Mocato, 9 Mod. 112.

⁴ Hill v. Barclay, 18 Ves. 63.

⁵ Hutcheson v. Heirs, &c. Ohio Cond. Rep. 10.

⁶ Co. Lit. 218 a. 2 Stra. 1128. 1 Atk. 383. 8 Pick. 284. Poph. 53.

seisin has no effect as a *claim*.¹ * In some instances of condition subsequent, Chancery will decree a reconveyance of the land. Thus, where a marriage settlement was made, on condition that if the wife on coming of age, should not charge her own estate with a certain sum, the settlement to be void, and she refused so to do; a reconveyance was decreed, with an account of the rents and profits from the time of refusal.²

37. Even where the condition provides that the estate shall be void on non-performance, the estate is not defeated without some act or declaration of the grantor.[†]

38. So, where A granted to B a license to enter upon his lands, and search for and dig ores for twenty-one years, provided that if he should cease to work the mine for six months, or break any of his covenants, the said indenture and the liberties, powers, &c. thereby granted, should cease, determine, and be utterly void and of no effect. Held, the word *void* should be construed to mean *voidable*; that although no *entry* was necessary to avoid the license, because it did not pass the land, yet by analogy to the rule in case of a freehold lease, the grantor should give notice of his intention to avoid it; and that until such notice, the right of possession, certainly as against any one not claiming under the grantor, remained in the occupant.³

39. There are some cases, where an entry for breach of condition is impracticable, or inconsistent with other rights, and therefore the law does not require it. Thus, where A grants land to B, with livery of seisin, for five years, on condition that if he pay a certain sum within two years he shall have the fee, and B fails to make payment at the time; inasmuch as A has no right of entry till the five years expire, the fee reverts in him without entry or claim. So, where one grants a rent-charge from his own land on condition, the rent becomes void upon breach of condition, without entry or claim, because the grantor is already in possession. For the same reason, if a grantee on condition, before a breach, lease the land to the grantor, no entry is required to revest the title in the latter.⁴

40. But where the party who is to perform a condition, and the party for whom it is to be performed, are jointly in possession, it is said the latter must make *claim* for a breach, by acts and words, or either of them, such as will distinctly admonish the grantee that possession will be retained for the breach, and not waived. *Complaints*

¹ Chalker v. Chalker, 1 Conn. 79.

² Hunt v. Hunt, Gilb. Rep. 43. Prec. in Cha. 387.

³ Roberts v. Davey, 4 Barn. & Ad. 664.

⁴ Lit. 350. Co. Lit. 218 a.

* It has been seen, (p. 159), that in many of the States, the bringing of a suit is made equivalent to re-entry, in case of non-payment of rent. In Ohio, the same provision applies to all breaches of condition. (Walk. Intro. 297. Sperry v. Pond, 5 Ohio, 387).

† But see p. 139, and infra s 41.

are mere *statements of a breach*, not expressions of an intent to claim a forfeiture.¹

41. Where the estate to which a condition is annexed is for years only, and is to cease on the lessor's doing a certain act, no entry is required to determine it. Thus if A lease to B for years, on condition that if he pay B £10, the estate shall cease, upon such payment the term *ipso facto* comes to an end.²

42. As the benefit of a condition can be reserved only to the grantor or lessor and his heirs, so no person could enter for breach of an express condition, at common law, except parties and privies in right and representation—that is, the heirs, executors, &c. of individuals, or the successors of corporations. Neither privies nor assignees in law, as the lord by escheat, nor privies in estate, as reversioners and remaindermen, had a right of entry. This rule, however, did not apply to implied conditions—as, for instance, that against a tenant's conveying a greater interest than he had; of which an assignee might take advantage.³

43. A condition may be of such a nature that, although relating only to the grantor himself, and not broken during his life, there may be a breach after his death, of which the heir may take advantage.

44. A man granted land to A, his child, on condition that A should support him, pay his debts, and save him from any trouble or cost on account of them, with a clause of re-entry. After the father's death, B, another child, presented a debt of the father to A for payment, which was refused. Whereupon B brings ejectment for a share of the land as an heir at law. Held the action would lie, though this debt had subjected the father to no cost, &c.—that clause in the condition being operative only during his life.⁴

45. A condition by means of a descent may be disannexed from the estate with which it was originally connected. Thus, although the land itself may descend to such special heirs as claim through the ancestor from whom it came to the deceased; the condition, being reserved to heirs generally, will pass to the heirs at common law. But after the latter have entered for condition broken, the former may re-enter upon them. Where the condition descends to one heir only as heir at common law, but the estate descends to several—as in the English gavelkind—after entry by the former, the rest shall enjoy the estate with him.⁵

46. At common law, as has been stated (s. 42), where a reversioner assigned his reversion, the assignee could not avail himself of any conditions annexed to the particular estate. The conditions were regarded as *rights in action*, which, by the policy of the law,

¹ Willard v. Henry, 2 N. H. 122.

² Plow. 142. Bro. Abr. Condition, 83.

³ Lit. 347. Co. Lit. 215 a. (See infra s. 46.) 2 Cruise, 31.

⁴ Jackson v. Topping, 1 Wend. 388.

⁵ 1 And. 184, 2, 22. Rob. Gav. 119. Godb. 3.

were not assignable. But by St. 32 Hen. VIII. c. 34, the assignees of reversions are placed on the same footing, in regard to conditions and taking advantage thereof, as the original lessors.

47. An assignee of *part of the land* is not within the statute; but an assignee of *part of the reversion* is.* The statute does not apply to one who comes to the estate *by law*, as, for instance, by escheat; because the language of it implies, that the assignee must be either an assignee *to*, or *by* the reversioner, claiming either in the *per* or the *post*—that is, one who comes in by act and limitation of the party. It seems, however, that a tenant by the curtesy or in dower, although claiming by law, is within the statute; being in *by* the wife or the husband. Although the words of the statute are “for non-payment of rent, or for doing waste, or other forfeiture,” yet an assignee can take advantage of such conditions only as are incident to the reversion, such as rent, or for the benefit of the estate, such as waste and repairs; and not those merely personal—as the payment of a sum in gross.¹

48. It seems, that in some cases, the party upon whom a condition is imposed, may himself take advantage of it to avoid his own act. Thus, it has been held, that where there is a lawful condition against alienation, under a certain age, if a deed be made before reaching this age, and a second after, the first is void, and the last valid.²

49. Entry for condition broken has the effect of entirely defeating the estate of the grantee, and restoring the grantor to the same title, which he had before the conveyance was made. It constitutes a paramount claim, and operates *by relation*, so as to avoid all intermediate rights and incumbrances. Thus, although the widow of a conditional grantee has dower, yet an entry for breach of condition will destroy this right. And whether made before or after the husband's death, it seems will make no difference.³

50. There are, however, some exceptions to this principle.⁴

51. A condition may be *waived* by the acts of the party for whose benefit it was created. Thus, where land was conveyed on condition of paying a certain annuity, and after a failure to pay, the annuitant accepted the annuity; held, a perpetual waiver of the condition.⁵

52. A father conveyed an estate to his son on condition, that unless the son maintained his parents and brother in a specified manner, and properly cultivated the land, the conveyance should be void for the whole land during the lives of the parents, and as to one half of

¹ Co. Lit. 215 a. Hill v. Grange, Plow. 167.

² Dougal v. Fryer, 2 Misso. 40.

³ Lit. 325. Co. Lit. 202 a. 1 Rep. 147 b. 1 Rolle's Abr. 474.

⁴ Co. Lit. 202 a.

⁵ Chalker v. Chalker, 1 Conn. 79.

* Thus, if a lease be made of three acres, and the reversion of two of them granted away, although the rent will be apportioned, the condition is destroyed, being entire and against common right. 2 Cruise, 22. But if the reversion is granted for years, the grantee may avail himself of a condition. Co. Lit. 215 a.

the land forever. The father having died, his widow claimed her dower instead of the support thus provided for her, and B transferred the land to another person. After the father's death, the mother was well supported, but neither she nor the father was supported in the manner pointed out by the deed, nor was the land well cultivated. The son, however, had always remained in possession with his parents, and they had accepted the support which he gave them, often complaining that the condition was not fulfilled, but never making formal entry or claim for a breach. Held, these facts showed a waiver of the condition.¹

53. A condition may be destroyed by a *release*, which may be made either to the grantee or his assignee, if there be one. And where the grantee has limited the estate to one for life, remainder in fee, a release to the tenant for life will inure to the benefit of the remainderman.²

54. *Accord and satisfaction* is a legal equivalent for performance of a condition precedent. So, where an act is to be done at a certain time, or on demand, an acceptance of the act after the time, or on a second demand, as and for a performance, will save the forfeiture.³

55. A condition is to be distinguished from a *limitation*. The latter requires no entry to terminate the estate, but terminates it *ipso facto*, by the mere happening of the event referred to. Thus, if A grant an estate to B till the death of C, B's estate immediately comes to an end upon the death of C.⁴

56. So, if a man makes a lease for a hundred years, if the lessee lives so long, upon the lessee's death the estate reverts in the grantor without entry. And a grantee of the reversion might always take advantage of a *limitation*, though not of a condition.

57. Where a condition subsequent is followed by a limitation to a third person, upon non-fulfilment or breach, this is a *conditional limitation*. Words of limitation mark the period, which is to determine the estate, but words of condition render it liable to be defeated in the intermediate time. The one specifies the utmost time of continuance; and the other marks some event, which, if it takes place during that time, will defeat the estate.

58. A conditional limitation is of a mixed nature. Thus, if an estate be limited to A for life, provided, that when C returns from Rome, it shall thenceforth remain to the use of B in fee; this is a condition, because it defeats the estate previously limited, while it is also a limitation, because no entry is required to take advantage of it. Such a disposition can be made, in general, only by will or a conveyance to uses. But, in New York it may be, by common law conveyance.⁵

¹ Willard v. Henry, 2 N. H. 120.

² Co. Lit. 291 b, 297 b.

³ Richards v. Carl, 1 Ind. 313. Hogins v. Arnold, 15 Pick. 250.

⁴ Co. Lit. 214 b.

⁵ 4 Kent, 121-3. 1 N. Y. Rev. St. 725. Cro. Eliz. 360.

CHAPTER XXIX.

MORTGAGE—NATURE, FORM, AND EFFECT OF A MORTGAGE.

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| 1. Definition and history of mortgages.
4. Right of redemption.
5. In fee or for years.
6. Deed and defeasance.
20. What constitutes a mortgage in Chancery. | 23. Personal liability of mortgagor.
26. Right of redemption cannot be restrained; mortgage and conditional sale, distinction between.
46. Power to sell given to mortgagee. |
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1. A MORTGAGE is a conditional conveyance of land, designed as security for the payment of money or performance of some other act, and to be void upon such payment or performance. The name is derived from the fact, that by the old law, where land was thus conveyed, unless the condition was performed at the day, the estate became *dead* or extinct. A mortgage was in fact a feoffment upon condition, or the creation of a base or determinable fee, with a right of *reverter* attached to it. The debt was required to be tendered at the time and place prescribed; and, in general, the strict rules of law pertaining to *conditions*, were rigidly enforced in relation to mortgages.¹

2. At an early period, however, the Court of Chancery interfered to relieve against the hardship of an absolute forfeiture, upon payment of the debt with interest and costs, if made in a reasonable time after the day appointed. Chancellor Kent remarks, "the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law."²

3. It was at first held, that the mortgagor had not the right of reacquiring his estate, as against those holding the estate of the mortgagee *in the post*, as, for instance, the widow having a right of dower, or the lord the right of escheat. But this distinction in favor of parties thus holding the land has long been wholly done away.³

4. The mortgagor's right to regain his estate by application to the Court of Chancery, after breach of condition, is called an *equity of redemption*; and the same phrase is generally, though it would seem somewhat inaccurately, used, to express the interest remaining in the mortgagor, even before breach of condition. But in the Revised

¹ Wade's case, 5 Co. 114. Goodall's case, 5 Co. 95. Lit. s. 332. Co. Lit. 210 b. 4 Kent, 139.

² 4 Kent, 156.

³ 2 Cruise, 79-80.

Statutes of North Carolina, the distinction between these two kinds of estate seems to be carefully observed; the former being entitled an equity of redemption, and the latter a *legal right of redemption*.¹

5. A mortgage may be made by a conveyance either in fee or for years. The latter form is rarely adopted in the United States. In Missouri, mortgages of leaseholds for more than twenty years are treated like mortgages of estates in fee.²

6. A mortgage may be made by an absolute deed and a *defeasance** back, instead of a single conditional deed. In England, this form of mortgage has been regarded unfavorably by the Courts, as indicating fraud, and injurious to the mortgagor; because the defeasance might be lost, and an absolute title set up.³

7. The Statute law, in many of the United States, expressly recognises this form of mortgage; and as deeds are universally registered, the inconveniences above suggested are less serious here than in England. In Delaware, the Statute speaks of "a defeasance, or a written*contract in the nature of a defeasance, or for reconveyance of the premises, or any part thereof." In Rhode Island, of a bond of defeasance or other instrument which creates a mortgage or redeemable estate. Similar terms are used in New Jersey and Illinois; but, ordinarily, the word defeasance only is used.⁴

8. It is the general rule, that the defeasance shall be a part of the same transaction with the conveyance. A conveyance must be a mortgage at the time of its inception; it never can become such by any subsequent act of the parties. If there ever was a moment when it could be considered only as an absolute estate, it must ever remain so. But provided both instruments are parts of one transaction, the defeasance may be dated after the deed.⁵

9. So, a condition will constitute a mortgage, if written on the back of an absolute deed, though without signature or seal.⁶

10. Where one conveys land for a certain consideration, and the grantee covenants to reconvey on payment of that sum, within one year, this is a mortgage, notwithstanding parol evidence that the parties intended otherwise.⁷

11. But a covenant by the grantee, to reconvey at an agreed price, unless certain improvements shall be commenced within a given time, is not a condition.⁸

¹ 1 N. C. Rev. St. 266. 4 M'Cord, 340. ² Misso. St. 410.

³ Forrest, 63. Sel. Cas. in Cha. 9.

⁴ 1 N. H. 39. 2 Mass. 493. Wright R. 44. Dela. St. 1829, 91. R. I. L. 204.

⁵ 1 N. J. Rev. Code, 464. Illin. Rev. L. 131.

⁶ 1 N. H. 41. Harrison v. Trustees, &c. 12 Mass. 456. 13 Pick. 413. (4 Yerg. 57, contra).

⁷ Stocking v. Fairchild, 5 Pick. 181.

⁸ Colwell v. Woods, 3 Watts, 188. (Hammond v. Hopkins, 3 Yerg. 525.)

⁹ Cunningham v. Harper, Wright R. 366.

* For a definition of this term, see *Defeasance*. To defeat a deed, it must itself be a deed, or an instrument under seal.

12. A conveys land to B, and, two years afterwards, B gives A a bond to convey the land to the wife of A, upon payment of certain notes. Held, no mortgage; and parol proof is inadmissible, that B agreed to A's keeping possession, that the deed was given as security, and the bond not made at the time, merely because the amount due upon the notes was not then ascertained.¹

13. A gave to B the following receipt or acknowledgment; "this day received of B a deed of, &c. for and in consideration of — dollars, paid by my recognisance and other demands against him; if on final settlement a balance shall be due him, I agree to pay it or reconvey to him, on being repaid for my advances and trouble; and I will return all that the land brings, besides repaying me." A afterwards sold the land. Held, this did not constitute a mortgage; that B had no interest liable to his creditors or which a Court of Equity would recognise, inasmuch as A had his election either to reconvey the land or pay the surplus balance, and had elected the latter by conveying the land.²

14. A bond, delivered to a third person as an *escrow*, will not constitute a defeasance, unless the condition on which it is to be delivered to the obligee is performed.

15. A, having borrowed money from B, conveys land to him. B signs a bond of defeasance, which, by mutual agreement, is left with C, to be delivered by him to A, if A repay the money borrowed within a certain time. The time having elapsed, without repayment, C delivers the bond to B. Held, although, if A had repaid the money within the time, the bond would have operated as a defeasance *by relation to the first delivery*, yet, as B held no security for the money, the transaction did not constitute a mortgage.³

16. An omission to register the defeasance makes the conveyance an absolute one, as to all persons but the parties and their heirs.⁴ And, it seems, *possession* by the grantee will be no equivalent for registration.⁵ In Delaware and New Jersey, the grantee of the land is required to record a note or abstract of the defeasance, with his deed, in order to give validity to the registry of the latter. But in Delaware, unless the grantor also record the defeasance within a certain time, it will be void against bona fide purchasers.

17. In Illinois, a statute provides that a party "shall not have the benefit" of a defeasance, unless recorded within thirty days.⁶ This would seem to render registration necessary even as between the parties.

18. Where the obligee in a bond of defeasance has treated it by

¹ Bennoch v. Whipple, 3 Fairf. 346. Lund v. Lund, 1 N. H. 39.

² Fuller v. Pratt, 1 Fairf. 197.

³ Bodwell v. Webster, 13 Pick. 411.

⁴ Grimstone v. Carter, 3 Paige, 421. Whittick v. Kane, 1 Paige, 202. Dey v. Dunham, 2 John. Cha. 182.

⁵ Fuller v. Pratt, 1 Fairf. 197. (3 Paige, 421).

⁶ Illin. R. L. 131.

his acts as constituting a mortgage, he cannot maintain an action upon it as a contract.

19. A conveys land to B. B gives back a bond, reciting that the consideration of the deed was to indemnify him from his liability for A upon a certain note, and providing that if A pays the note at a certain time, and B does not reconvey the land upon demand, the obligation shall be binding. A paid the note within the time and demanded a reconveyance, and then transferred all his interest in the land to C. It seems, this bond made the transaction a mortgage. Held, B could not maintain an action upon the bond.¹

20. In Chancery, when it appears, even by parol evidence, that land is conveyed to secure the payment of money, the conveyance will be held a mortgage; even as between a judgment creditor of the grantor, and the heir or executor of the grantee.² This principle is adopted in all those States, which have Courts with full Chancery jurisdiction.

21. In New York, such evidence is received even at law, and as against third persons; provided they have not been misled to their prejudice by the absolute form of the deed.³

22. This principle, however, does not prevail in Massachusetts, New Hampshire, and other States, where the Courts of law have only limited Equity jurisdiction. The principle is, in these States, that, before the Court can exercise Chancery powers, it must decide, *as a Court of law, whether there is a mortgage.*⁴

23. A mortgage sometimes contains a *covenant* to repay the money borrowed, which creates a personal liability upon the mortgagor. If there be no such covenant, and no personal security, such as a bond or note, accompanying the mortgage, the latter alone creates no personal claim for the debt, but merely a lien upon the land. But the deed is still an effectual mortgage. Lord Thurlow was of opinion that a mortgagee, by virtue of the mortgage itself, became a simple contract creditor; and in Pennsylvania, a conditional conveyance, though containing no covenant, may constitute a mortgage upon which the creditor may recover the money due him. So in North Carolina, the want of a covenant in the mortgage is no bar to the right of redemption.⁵

24. It has been held in New York, that an acknowledgment, in a mortgage, of indebtedness in a certain sum, and that the property is

¹ *Hogins v. Arnold*, 16 Pick. 259.

² *James v. Johnson*, 6 John. Cha. 417. *Clark v. Henry*, 2 Cow. 324. *Slee v. Manhattan Co.*, 1 Paige, 48. *Miami, &c. v. Bank, &c.*, Wright, 249. *May v. Eastin*, 2 Porter, 414. *Van Buren v. Olmstead*, 5 Paige, 9. *Brown v. Wright*, 4 Yerg. 57. 1 Ves. 160. 2 Sumn. 487.

³ *Walton v. Cronly*, 14 Wend. 63.

⁴ *Kelleran v. Brown*, 4 Mass. 443. 1 N. H. 41, 2, 71, 167. *Supra* p. 267.

⁵ 1 N. Y. Rev. St. 738. 8 Mass. 564. 1 P. Wms. 268. 2 Munf. 337. *Ancaster v. Mayer*, 1 Bro. 464. *Wharf v. Howell*, 5 Bin. 499. *Wilcox v. Morris*, 1 Mur. 117.

transferred for security, gives to the mortgagee a personal right of action, without first resorting to the property.¹

25. In New Hampshire it is held, upon a construction of the statute relating to mortgages, that there can be no mortgage, unless the land be put in pledge on condition for the payment of money or some other act. A conveys land to B, to enable him to sell it, account with A for \$2000, and retain the balance for his services. Afterwards, B reconveys, provided that if he pay A \$2000, the deed shall be void. Held, as B was under no obligation to pay the money, the transaction was no mortgage, but only a *conditional sale*.²

26. Mortgages being always designed as a mere security, and to prevent lenders from taking undue advantage of borrowers; the right of redemption is held in Equity to be an inseparable incident to a mortgage, and all restrictions or qualifications of this right are deemed utterly void. The maxim is, "once a mortgage, always a mortgage." Hence a proviso, limiting the right of redemption to the mortgagor himself, is of no effect, and his heir after his death may redeem. So, although limited by an express covenant to the heirs male of his body, a jointress or assignee claiming under him may redeem. The right of redemption has been said to be as inseparable from a mortgage, as that of replevying from a distress. In one case, Lord Nottingham held (it would seem not only in *disregard*, but in direct *reversal*, of the principle above stated) that the mortgagee might at any time compel the mortgagor to redeem or be foreclosed, though the deed expressly provided that he should have his whole life-time to redeem. But this decision was reversed by his successor, and the latter judgment affirmed in Parliament.³

27. A condition, that if the mortgagee, on failure of the mortgagor to pay the money at the time, pay him a further sum, the former shall become absolute owner—is void; though an agreement to give the mortgagee the right of pre-emption, in case of a sale, has been assumed to be valid. Chancellor Kent, however, suggests that this agreement, like the former, would be void.⁴

28. Mortgage for £200, with a bond conditioned, that if not paid at the day, and if the mortgagee should then pay the mortgagor the further sum of £78 in full for the purchase of the land, the bond should be void. The £200 not being paid, and the mortgagee having paid the £78, held, the infant heir of the mortgagor might redeem.⁵

29. A mortgagee may contract, subsequently to the mortgage, for a purchase or release of the Equity of redemption; but no agreement

¹ Elder v. Rouse, 15 Wend. 218.

² Porter v. Nelson, 4 N. H. 130. 5 Gill & J. 75. (But see 1 Vern. 138).

³ Jason v. Eyres, 2 Cha. Ca. 22. Howard v. Harris, 1 Vern. 33, 190. 7 John. Cha. 40. 2 Cow. 324. 2 John. Cha. 30. 7 Cranch, 218. Bowen v. Edwards, 2 Rep. in Cha. 221. 2 Sumn. 487.

⁴ 4 Kent, 142.

⁵ Willet v. Winnell, 1 Vern. 488.

for a beneficial interest from the estate during the mortgage is valid, if disaffirmed in reasonable time.¹

30. On the same principle, if the mortgagor agree by a distinct contract to pay the mortgagee a sum over and above the debt, interest and cost, such contract will be set aside as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye agreement.

31. A loaned to B a sum of money on mortgage, and at the same time took from him a separate covenant, to convey to A, if he thought fit, certain ground rents of the same value. On a bill for redemption by B, held he might redeem by paying merely the sum loaned, with interest and cost.²

32. An agreement, subsequent to the making of the mortgage, between any party interested as mortgagee, and the mortgagor or his assignee, to limit the right of redemption to any particular time, will not be enforced.

33. A mortgagee filed a bill in Equity for foreclosure against the mortgagor and his creditors, having an interest in the Equity of redemption, and obtained a decree. The defendant, one of the creditors, paid and took an assignment of the mortgage, and agreed with the other creditors that they might redeem within a certain time. The defendant having had possession twenty years, the other creditors file a bill for redemption. Held, the other creditors stood in the confidential relation of mortgagor to the defendant; and as the decree for foreclosure was not assigned to him, the agreement limiting the time of redemption was void, and they might redeem.³

34. A mortgage is to be distinguished from a *sale*, with an agreement to *re-purchase*. The latter transaction, though narrowly watched, is construed like any independent agreement between strangers; and the seller will not have a mortgagor's right to redeem after the appointed day. But Equity will always construe the transaction to be a mortgage, if possible.⁴

35. Where there is an agreement for a re-purchase within a certain time, by the mortgagor, of the estate mortgaged, and such agreement is made, not at the giving of the mortgage, but afterwards; the right of redemption or re-purchase may be restricted to the time stipulated.

36. A, being a joint tenant with B, made a conveyance to C for £104, absolute in form, but admitted to be in reality a mortgage. This deed was cancelled, and another similar one made for a larger consideration, including the £104, and covenanting that A would not make partition without C's consent. The receipts for the money

¹ 4 Kent, 143.

² Jennings v. Ward, 2 Vern. 520.

³ Exton v. Greaves, 1 Vern. 138.

⁴ 4 Kent, 143-4. Davis v. Thomas, 1 Russ. & M. 506. Poindexter v. McCamon, 1 Dev. Eq. 373. 1 R. & M. 506.

spoke of it as purchase money. Two years after the last deed, it was agreed that A should regain the land, on payment of principal, interest and costs. B being in possession, C recovered the land in ejectment, and occupied sixteen years. A brings a bill to redeem. Held, though the covenant against partition showed that A was still supposed to retain an interest in the land, and though the first deed was allowed to be a mortgage, yet the case, on the whole, was one of a subsequent agreement for re-purchase, and, after the lapse of so long a time, a redemption should not be allowed.¹

37. So, where a mortgagee, having recovered the land for breach of condition, for an additional advance of money obtains a release of the Equity from the mortgagor, at the same time giving him a promise to sell and convey, on payment of the whole money advanced within a certain time; after this time has elapsed, the estate becomes absolute in the mortgagee; the last transaction being regarded as an original contract to convey the estate upon certain terms. In this case, however, sixteen years had elapsed.²

38. Where a mortgage is made to or for a relation or a wife; in conformity with the presumed intention of the mortgagor, to make the conveyance beneficial to the mortgagee, the right of redemption will be limited strictly to the time specified. In case of a marriage settlement, an omission to perform the condition will be construed as an election to let the settlement stand, and no redemption will be allowed, especially after the mortgagor's death, and against a purchaser without notice from the wife.

39. Thus, where A conveyed to B, to whom he was related by marriage, by an absolute deed, and took back another deed, making the land redeemable during A's life; held, in reversal of Lord Nottingham's decree, that the heir of A could not redeem.³

40. A granted a rent charge of £48 per annum to B in fee, on condition, that if A should at any time, after notice, pay in the purchase money by certain instalments, with interest, during his life, the grant to be void. The rent-charge fell short of the interest, and there was no covenant to pay the money. After A's death, B conveyed to C with warranty, and C to D. Sixty years having elapsed, upon a bill for redemption, held, the circumstances of the case showed that the mortgagee had parted with a fair equivalent for purchasing the right of redemption after A's death, and the lapse of time made the case still stronger against the bill, which was accordingly dismissed.⁴

41. A mortgages an estate to B and B to C, for £200, A and his

¹ *Cotterell v. Purchase*, Ca. Temp. Tal. 61. (*Austin v. Bradley*, 2 Day, 466. 2 N. Y. Rev. St. 546).

² *Endsworth v. Griffith*, 2 Abr. Eq. 596. 5 Bro. Parl. 184.

³ *King v. Bromley*, 2 Abr. Eq. 596. *Bonham v. Newcomb*, 2 Vent. 364. 1 Abr. Equ. 312.

⁴ *Floyer v. Lavington*, 1 P. Wms. 268.

son D joining in the latter mortgage. To secure payment of the interest, C leases to the son of A for 5000 years, at the rent of £12 per annum, for the first three years, and the rest of the term £10; and if the £200 and interest were not paid in three years, the land to be reconveyed. Receipts were given sometimes as for interest, and sometimes for a rent-charge. The last receipt was about forty years subsequent to the lease. Ten years after this receipt, a bill was brought for redemption by the grandson of A, the estate having nearly doubled in value since the mortgage. Held, it would not lie.¹

41. A having received a patent from the Crown for land for a term of years, at a certain rent, a subsequent patent not noticing the former was made to B. The former term having nearly fifty years to run, and being worth £200 per annum, B in consideration of £200, by lease and release, conveys to A, with the condition that upon repayment within five years he might re-enter; but on failure of payment at the time, the estate of A should be absolute and indefeasible, both in equity and law, and B forever debarred from all right and relief in Equity. And B hereby released forever his right to redeem on failure as aforesaid. There was no covenant for payment of the £200. The five years having expired, A brings a bill in Equity for foreclosure, to which B never put in any answer or defence, and a decree was made that B should be foreclosed, unless the money were paid upon a certain day. More than thirty years afterwards, the lands having risen in value, the heirs of B bring a bill in Equity against the heirs of A, alleging surprise and imposition in obtaining the decree, and praying redemption. The plaintiffs prevailed, but the decree was reversed in the House of Lords. The grounds of argument for the defendants were, the terms of the conveyance from B to A, waiving all right of redemption; the reversionary character of B's estate, yielding no present profit, and worth at the time not more than £200; and the want of any covenant to pay, the money, and consequently of any mutuality in the transaction, which is essential to constitute a mortgage.²

42. The distinction between a mortgage and a conditional sale is said to be, that if a *debt* remains, the transaction is a mortgage, but if the debt is extinguished by mutual agreement, or the money advanced is not *loaned*, but the grantor has a right to refund in a given time, and have a reconveyance; this is a conditional sale. The true inquiry is, whether the purpose of the parties was to treat of a *purchase*, the value of the commodity contemplated, and the price fixed. And the point is to be settled by *the whole transaction*, not merely the written evidence. Parol evidence is received, not to explain or construe the writings, but to show the true character of the contract. Various and minute circumstances are to be taken into view. If a

¹ Mellor v. Lees, 2 Atk. 494.

² Tasburgh v. Echlin, 2 Bro. Parl. Cas. 265.

fair price is advanced, the property liable to injury, such as requires frequent repairs and of fluctuating fashion and profits; or if the purchaser, though not put into actual possession, leases to the grantor, and receives the rents, &c. without accounting, and the grantor's wife releases her dower; and if the property is a large building, subject to fire, and at the grantee's risk, and he has no power to enforce his claim against the grantor, there being no covenant or promise by the latter, while he at the same time has the right of repurchasing within a given time; all these facts go to show a conditional sale.¹ The want of any *personal obligation* against the grantor, though not conclusive, is very strong evidence of a conditional sale; for a *mortgagee* must have a remedy, express or implied, against *the person* of the debtor. But Chancery will always lean in favor of a mortgage.²

43. A mortgages land to B, afterwards to C. A subsequently conveys to B absolutely in fee. The deed recites, that the mortgage debt to B is due, and that A had agreed to convey absolutely to B, subject to the payment by B of C's debt, which B accordingly pays. B gave back to A an agreement, that upon A or his heirs paying B or his heirs, at the end of two years, the sum named in the deed, B or his heirs would convey to A. "A to pay B \$125 per year." Two months afterwards, A releases thus—"all my right and claim in, &c. that I have deeded to B, and I give him possession," which was taken by B. The Equity was worth from \$2000 to \$1500, and the purchase for \$1600. No compulsory measures were taken or threatened by B against A. No covenant or obligation remained against A for the payment of money. Held a conditional sale.³

44. The rule above stated, as to the right of redemption and the distinction between a mortgage and a conditional sale, has been applied to the conditional assignment of a mortgage itself.

45. A assigns a mortgage to B, upon condition that if certain expected receipts shall amount to \$300, B shall reassign and account for the surplus over that sum; if they shall not amount to that sum, and unless A in one week pay the deficiency, the mortgage to be considered as absolutely assigned. The receipts having fallen short of \$300, held this was a mortgage or pledge, not a conditional sale, and that A should have relief in Equity on making up the \$300.⁴

46. A power may be given to a mortgagee, in case of non-payment at the time, to sell the estate.* And he may pass a title, without the mortgagor's joining in the deed.⁵

47. Such power having been inserted in a deed of defeasance, the

¹ 1 Paige, 56. 2 Ball & B. 274. 2 Edwards, 138. Robertson v. Campbell, 2 Call, 354. 1, 244. 19 Ves. 413. 5 Gill. & J. 82-3. 2 Yerg. 6. 6, 96. Hannah, &c. Bland, 225-6. 1 Russ. & M. 506. 2 Sumn. 487.

² Conway v. Alexander, 7 Cranch, 237. (2 Des. 564).

³ Hicks v. Hicks, 5 Gill. & J. 75.

⁴ Solomon v. Wilson, 1 Whart. 241.

⁵ Corder v. Morgan, 18 Ves. 344. (See 4 Nev. & Man. 531).

* By the civil law, the mortgagee has this power by implication, and even an express agreement will not deprive him of it. 1 Dom. 360.

proceeds to be first applied to the debt, and the surplus paid to the mortgagor, the mortgagee, on failure of payment, agreed with a third person to convey the land to him. The Court decided, that this agreement was not equivalent to an actual sale, but seemed to take it for granted, that such conveyance would be effectual to pass the estate.¹

48. In a similar case, the land having been sold at auction, the purchaser required the concurrence of the mortgagor, who refused to join, alleging that the sale was made at a sacrifice, and without his consent. The purchaser then brings a bill against the mortgagee and mortgagor, which was sustained against the former, but dismissed as to the latter.²

49. Lord Eldon considered the power in question as a dangerous and extraordinary one, and of modern introduction, and thought it should be vested in some third person as a trustee for both parties. But Chancellor Kent remarks, that the mortgagee himself, under such power, becomes a trustee for the surplus; and that unless due notice be given of a sale, Equity will set it aside.³

50. The only doubt as to the validity of such power seems to be, as it affects the rights of subsequent mortgagees.⁴

51. In Maryland, by a very recent act, real estate mortgaged in the city of Baltimore may be sold under such power.⁵ The validity of a power to sell is also recognised in other States.

52. If, upon a sale under a power, the mortgagee himself purchases, the sale is voidable in Equity by the mortgagor, for good grounds, though not absolutely void. In New York, the mortgagee is authorized to purchase, if it be done fairly; and the affidavit of sale, without deed, will perfect his title. In the same State, the power, to be effectual, must be registered or recorded. Similar provisions in Maryland. (See *infra*, *Powers*).⁶

53. It has been held in Massachusetts, that the giving of a power to sell, in an instrument which would otherwise be a mortgage, does not change the character of the mortgagee's estate. For although he may pass an *absolute* title to a third person by executing the power, yet, until it is executed, he himself has only a *conditional* title. And even a purchaser will not take an absolute estate, it seems, if he has notice of the original nature of the transaction, and purchases with some reference to the conditional character of the title.⁷*

¹ Croft v. Powel, 2 Com. R. 603.

² Clay. v. Sharpe, 2 Cruise, 95. Sug. on Vend. 6th edit. App. 14.

³ Roberts v. Bozon, Feb. 1825. 4 Kent, 146.

⁴ Walk. Intro. 306. ⁵ Md. St. 1836-7, ch. 249.

⁶ Munroe v. Allaire, 1 Caines' Cas. in Er. 19. Davoue v. Fanning, 2 John. Cha. 252. Sloc v. Manhattan Co. 1 Paige, 48. 2 N. Y. Rev. St. 546. 4 Kent, 147.

⁷ Eaton v. Whiting, 3 Pick. 484. This case seems to recognise the validity of the power in question; though the conveyance was here expressly in trust to sell, and the condition contained in a subsequent clause.

* Note to ch. 29. In New Hampshire (St. 1829, 532,) the condition of a mortgage must be contained in the deed itself if for more than seven years.

CHAPTER XXX.

MORTGAGE—WHAT ESTATE IT CREATES IN THE MORTGAGOR AND THE MORTGAGEE.

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| <ol style="list-style-type: none"> 1. Estate remains in the mortgagor, as to third persons, but not as to the mortgagee. 7. Mortgagee may take possession, when. 8. Agreement for mortgagor's possession. 16. Mortgagor in possession, nature of his estate—tenancy at will, &c. 17. Cannot commit waste, but not bound to repair. | <ol style="list-style-type: none"> 18. Lease by mortgagor before or after the mortgage; rights of the lessee and mortgagee. 34. Mortgagee of leasehold, liable on covenants. 35. Waste by mortgagee. 36. Lease by mortgagee. 37. Renewal of lease by mortgagee. |
|---|--|

1. ALTHOUGH a mortgage, in form, purports to convey a present estate to the mortgagee, liable to be defeated by performance of the condition named; yet the well-settled modern doctrine is, that notwithstanding the conveyance, the mortgagor, not only in equity but at law, remains owner of the land, till some further act is done to vest it in the mortgagee. In other words, although the condition of a mortgage is in form *subsequent*, operating to divest an interest once vested; yet it is in substance and practice *precedent*, operating to vest an estate which previously remained in the mortgagor. The language of the transaction is, that A conveys to B, reserving the right to take back the estate on doing a certain act; while the effect of it is, that A transfers to B a mere claim or lien upon the land, with the right of gaining the land itself, upon A's failing to perform such act.

2. Several considerations seem to show, that this is the true view of the relation between mortgagor and mortgagee. The mortgagor is a *freeholder* in respect to the estate mortgaged. This estate in his hands is regarded as real property, and as such must be inherited, conveyed, devised, or taken upon legal process, while the mortgagee's interest on the other hand is merely personal, as will be more fully explained hereafter. The mortgagor may maintain an ejectment or real action for the land, to which the mortgage cannot be set up as a defence.¹

3. Lord Mansfield said, it is an affront to common sense, to say

¹ Jackson v. Willard, 4 John. 41. Huntington v. Smith, 4 Conn. 235. Willington v. Gale, 7 Mass. 138. M'Call v. Lenox, 9 S. & R. 302. Ford v. Philpot, 5 Har. & J. 312. Wilson v. Troup, 2 Cow. 195. Blaney v. Bearce, 2 Greenl. 132. Astor v. Miller, 2 Paige, 68. Miami, &c. v. Bank, &c. Wright, 249. Den v. Dimon, 5 Halst. 156-7.

that the mortgagor is not the owner of the land.¹* In South Carolina, a statute expressly declares him to be such.² There, (as in New York) even after condition broken, or after the time stipulated for redemption is past, the mortgagee can maintain no possessory action, but is limited to his statutory remedy, and the right to redeem is a *legal right*, not a mere equity.

4. It will be at once perceived, however, that all the particulars above-named have reference to the relation which a mortgagor sustains to *third persons*. A mortgage being merely security for a debt, there would be little propriety in attributing to it the effect of passing away the estate from the former owner, except so far as is requisite to effect the object of the transaction. But to this extent, or, in other words, as between the mortgagor and the mortgagee, for the purpose of rendering available the security given; a different rule prevails, and the mortgagee has all or most of the rights of a legal owner.

5. A, by consent of B, a mortgagor in possession, built a house upon the land. The house was sold on execution as A's, and C, the purchaser, brings a suit for it against D, who claimed under a purchase from B. Held, the mortgagee having a mere lien on the property, if any interest in it, D could not defend on the ground that the mortgagee did not consent to the erection of the house and forbade its removal; that the rights of the latter would not be affected by the event of this suit, and the house would remain subject, as before, to his claim.³ It was intimated by the Court, that the mortgagee acquired no lien upon a house thus erected, although he might secure the rents by taking possession; but that it was *the personal property* of A.⁴

6. The distinction, above pointed out, seems to have been reversed by an observation of the Court in Massachusetts; that "the mortgagee has the whole estate *against all but the mortgagor*, in the same manner as if it were absolute."⁵ This, however, is a mere *dictum*, and the law seems to be well settled as above stated.

7. A mortgage gives to the mortgagee an immediate right of possession, which he may assert by entry or action, unless there be an express stipulation to the contrary, which is often the case, and is said to be a very ancient practice, as early as the times of James I.

8. Where it is provided that the mortgagor may remain in posses-

¹ *Rex v. St. Michaels*, Doug. 632.

² 1 Brev. Dig. 175. 4 M'Cord, 340.

³ *Jewett v. Patridge*, 3 Fairf. 243.

⁴ *Ib.* 252.

⁵ *Fay v. Brewer*, 3 Pick. 204.

* In New Hampshire, the old and literal construction of a mortgage seems to be at least in theory substantially retained. It is there said, that the mortgagor retains only a *power to regain the fee*, and that the condition *as to him* (not as to the mortgagee), is a precedent one, he being a mere tenant at sufferance, and having no right of possession. *Brown v. Cram*, 1 N. H. 171. See also 2 N. H. 16. 10 Conn. 243.

sion for the number of years given for repayment of the debt, it is said he becomes a tenant for years of the mortgagee. And the mortgagor may have trespass against the mortgagee or his assigns for entering. After the time fixed, he becomes a *tenant at sufferance*.¹

9. A parol agreement, that the mortgagor shall remain in possession till breach of condition, is insufficient; though the condition be to support the mortgagee and his wife, which could probably be done only out of the estate mortgaged.²

10. But an agreement or understanding, that the mortgagor is to remain in possession, may be implied from the terms of the deed or other accompanying instrument. It may operate by *estoppel*, *covenant*, *condition* or *reservation*.³

11. A sold to B a mill, took a mortgage back, and gave B a bond, stating the privileges which B was to enjoy in using the water, dam, &c., covenanting to build machinery in the mill, and not follow himself, or suffer others to follow, the same occupation, while B continued it; and reserving to himself the use of a room in the mill for a certain time. Held, the bond amounted to a covenant, that B might occupy the mill till breach of condition, and that A could not maintain a writ of entry at common law against B.⁴

12. So where the condition of a mortgage was, that the mortgagor should carry on the farm during the life of the mortgagee, and deliver him one half of the produce; held, the mortgagee had no right to enter, till condition broken or waste committed; or except for the purpose of taking his share of the produce.⁵

13. Where the mortgagor of a leasehold estate reserves the right to remain in possession till breach of condition, and holds over after such breach, he is not liable *for rent* to the mortgagee, previous to the entry of the latter. And, the mortgagor having tendered the debt after the time it fell due, the title to the estate cannot be tried in a suit for rent.⁶

14. A mortgagor, reserving the right to keep possession till breach of condition, may allow a stranger to occupy under him; and the latter, having entered before breach, is not a trespasser in continuing to occupy afterwards.⁷

15. In Vermont, a statute provides that the mortgagor shall have the right of possession till breach of condition, unless the deed clearly show the contrary. In Massachusetts, on the other hand, the mortgagee's right of possession is recognised, unless there is an agreement to the contrary.⁸

¹ *Powsely v. Blackman*, Cro. Jac. 659. *Partridge v. Bere*, 5 B. & A. 604. *Jackson v. Bronson*, 19 John. 325. 14 Pick. 530-1. *Dickenson v. Jackson*, 6 Cow. 147.

² *Colman v. Packard*, 16 Mass. 39. 2 Greenl. 132.

³ 11 Pick. 477.

⁴ *Bean v. Mayo*, 5 Greenl. 89.

⁵ *Hartshorn v. Hubbard*, 2 N. H. 453. *Flagg v. Flagg*, 11 Pick. 475.

⁶ *Mayo v. Fletcher*, 14 Pick. 525.

⁷ *Ib.*

⁸ 1 Ver. L. 109. Mass. Rev. St. 635.

16. Where there is no agreement, express or implied, that the mortgagor shall retain possession, his possession is strictly *at the will of the mortgagee*. He has often been called a *tenant at will*. But technically there is little propriety in this designation. In the first place, a mortgagor wants the chief mark or characteristic of a tenant or lessee, which is the payment of rent; for while a mortgagor, or any one holding under him, remains in possession, he receives the rents and profits for his own account: and, in the second place, he has none of the privileges of a tenant at will, in regard to notice to quit, but may be immediately turned out without any notice, and without the privilege of emblements, the crop being liable for the debt. Lord Mansfield very justly denominated him a *quasi* tenant at will;* at the same time remarking, with reference to the prevailing language of the law on the subject, that “nothing is so apt to confound as a simile.” But whatever character we may give to the mortgagor in possession by sufferance of the mortgagee, he is still a *tenant*. He has sometimes been called an *agent*, but without foundation, for he is not liable to *account*.¹

17. A mortgagor will be restrained by the Court of Chancery from committing *waste*, and thereby diminishing the security of the mortgagee. But the mortgagor is not bound to make repairs; and, if he cut down trees before breach of condition, the mortgagee cannot have trover against him.²

18. A mortgagor in possession cannot make a *lease*, to bind the mortgagee.³ His possession cannot be considered as holding out a false appearance, or inducing a belief that there is no mortgage, for it is the nature of the transaction that he should remain in possession, and the mortgagee receive interest; and whoever wants to be secure, when he takes a lease, should inquire after and examine the title deeds. Whenever one of two innocent persons must be a loser, the rule is, “*qui prior in tempore, potior est in jure*.” Hence the mortgagee may maintain ejectment for the land against the lessee.

19. Such are the principles laid down by Lord Mansfield on this subject. In the United States, they derive additional force from the universal practice of registering mortgages as well as other deeds. If not recorded, a mortgage will be invalid against a subsequent lease;

¹ *Moss v. Galtimore*, Doug. 279. 1 T. R. 378. Doug. 21. 14 Pick. 530-1. *Jackson v. Fuller*, 4 John. 215. 1 Leigh, 297. *Rockwell v. Bradley*, 2 Conn. 1. *Wake-man v. Banks*, Ib. 445. 4 Kent, 155-6. *Blaney v. Bearce*, 2 Greenl. 132. 9 S. & R. 311. 3 Halst. 316. 5 B. & A. 604.

² 3 Atk. 723. *Smith v. Goodwin*, 2 Greenl. 173. *Campbell v. Macomb*, 4 John. Cha. 534. *Fay v. Brewer*, 3 Pick. 203. *Peterson v. Clark*, 15 John. 205.

³ *Keech v. Hall*, Doug. 21.

* It will be seen presently, that while a mortgagor, in most respects, has a less estate than a tenant at will, he is, in one particular, treated more favorably than the latter. It has been stated (p. 185) that the *assignee* of a tenant at will becomes a trespasser by entry upon the land; while the better opinion is, that the assignee of a mortgagor is not a trespasser, but succeeds to all the rights of the mortgagor.

but if it is recorded, the lessee has implied notice, and takes subject to the mortgage.

20. In the case decided by Lord Mansfield, it is said the mortgagee had no notice of the lease nor the lessee of the mortgage, and that if the mortgagee had encouraged the tenant to lay out money, he would be bound by the lease. How far this fact would qualify the effect of registration, is perhaps a doubtful question.

21. It is to be observed, however, that an assignee of the mortgage succeeds to all the rights of the mortgagee himself. Hence, if after a lease by the mortgagor, the mortgagee assigns the mortgage, the assignee may have ejectment against the tenant.¹

22. It has been said, that the mortgagee may consider the lessee of the mortgagor as a *trespasser*, a *disseisor* or a *lessee*, at his election. It seems, however, that the mere entry of such lessee does not constitute him a trespasser, but only his refusal to quit, when required. In *Keech v. Hall*, the case above cited, it is said, "the tenant stood exactly in the situation of the mortgagor," against whom clearly trespass would not lie without previous notice.²

23. So the mortgagee cannot recover, in an action of trespass for mesne profits against an assignee of the mortgagor, the rents and profits accruing after commencement of a suit by the mortgagee to obtain possession.³ In deciding this point, the Court remark, "it seems to be admitted, that the mortgagor was not a trespasser before he was served with the writ in the action to foreclose." "The question submitted is the same, as if the action were between the mortgagee and mortgagor."⁴ "He cannot be considered a trespasser until after an entry by the mortgagee."⁵ Chancellor Kent is of opinion, that the assignee is no more a trespasser than the mortgagor himself; and that this is the better and more intelligible American doctrine.⁶

24. In Massachusetts, Connecticut and Pennsylvania, the English rule, by which a mortgagor is not entitled to notice to quit, has been adopted. In New York, on the other hand, it has been held, that ejectment would not lie against a mortgagor as a trespasser, without notice, there being a privity of estate and a tenancy at will by implication. But it would lie against an assignee of the mortgagor. It will be seen hereafter, that the action of ejectment by a mortgagee is now abolished.⁷

25. Though mere occupancy does not constitute the mortgagor a trespasser, yet, for any wrongful act on his part relating to the estate,

¹ *Thunder v. Belcher*, 3 E. 449.

² *Wilder v. Houghton*, 1 Pick. 87.

³ *Ib.* 88.

⁴ *Ib.* 89.

⁵ 2 Cruise, 76. 1 Pow. 159 n., 160.

⁶ 4 Kent, 156-7.

⁷ *Rockwell v. Bradley*, 2 Conn. 1. *Wakeman v. Banks*, *Ib.* 445. *Groton v. Bxborough*, 6 Mass. 50. 9 S. & R. 311. *Jackson v. Laughhead*, 2 John. 75. *Jackson v. Fuller*, 4, 215, 18, 487. 2 N. Y. R. S. 312. In New Hampshire, the mortgagor may be treated as a trespasser. *Pettengill v. Evans*, N. H. 54.

the mortgagee may maintain trespass against him; as, for instance, the cutting and carrying away of timber trees. Where the land mortgaged is wild land, a question has been made whether a general usage to cut timber upon such land is to be held equivalent to an implied license. Trespass also lies by an assignee of the mortgage against an assignee of the mortgagor for the removal of fixtures, though erected by the latter assignee.¹

26. A lease by the mortgagor, subsequent to the mortgage, is valid between him and the lessee, and as to all the world but the mortgagee, and entitles the lessee to redeem.

27. Where a lease has been made before the mortgage, the mortgagee takes of course subject to the former, and cannot interfere with the lessee's possession, so long as the latter fulfils his own obligations in regard to the land. But a mortgagee, under such circumstances, seems to stand on the footing of any other assignee of a reversion, and, after condition broken, may call on the tenant to pay rent to him instead of the mortgagor. Since the statute of Anne, no *attornment* is necessary to create this liability on the part of the tenant. Although the statute provides, that any payment of rent by the tenant shall be effectual, until he has notice of the assignment, yet, upon the giving of such notice, the title of the assignee relates back to the time of the assignment. Upon this principle, the mortgagee, in the case supposed, may call on the tenant to pay him not only future rents, but those at the time in arrear, and may distrain for them. This remedy is said to be a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.* It has been seen (p. 129) that in several of the States, by express statutes, a lessee may attorn to a mortgagee after forfeiture.

28. Hence it appears, that although the relation of landlord and tenant does not subsist between mortgagee and mortgagor, it may arise between the mortgagee and the lessee of the mortgagor.

29. In the case above referred to, where the mortgagee's claim of rent was made upon breach of condition by the mortgagor, it is said, the mortgagor previously received the rent by a tacit agreement with the mortgagee; but the mortgagee may put an end to this agreement when he pleases. Whether this tacit agreement would prevent the mortgagee from claiming rent immediately upon the execution of the mortgage, is a point not distinctly decided; but, on principle, it would seem to have no such effect. The true view of the matter would appear to be, that where the mortgage is made before the lease, the latter is wholly invalid against the former; but where the lease is made first, it is by priority paramount to the mortgage, and the lessee cannot

¹ *Stowell v. Pike*, 2 Greenl. 387. *Smith v. Goodwin*, 2 Greenl. 173.

* *Moss v. Gallimore*, Doug. 279. 1 T. R. 384. (15 Pick. 147.)

therefore be disturbed ; but still the mortgagee takes the place, and succeeds to all the rights, of the mortgagor.

30. If the mortgagee himself take a lease from the mortgagor, he shall not set up the mortgage as a defence to a suit for the rent. If the lease be made first, he may refuse to pay rent, which shall go to extinguish the mortgage debt.¹

31. The lessee of a mortgagor, the mortgage being prior to the lease, if ejected by the mortgagee, is not entitled to emblements.²

32. The doctrine, that where a mortgage is *prior* to a lease made by the mortgagor, the mortgagee may claim rent of the lessee as his tenant, has been strongly denied in New Jersey and New York. It is said that the case of *Birch v. Wright*, (1 T. R. 378), the only case where the point is pretended to have been settled, does not decide it, but stands upon other grounds.

33. A mortgaged land to B, but remained in possession, and conveyed to C. C admitted D as his tenant. C's interest in the land was afterwards sold on execution to E. Immediately upon the sale, and before a deed was given, D attorned to E, and agreed to occupy at a certain rent. B afterwards notified D to pay rent to him, and D, receiving an indemnity, accordingly paid it. E brings an action against D for the rent. Held, these facts furnished no defence to the suit. A distinction was taken between the case of a lease prior to the mortgage, and the present case where it was subsequent to the mortgage. In the former case, the rent passes as incident to the reversion which is mortgaged, and the mortgagor is estopped by his own deed to claim it afterwards. But in the present case the defendant was never tenant to the mortgagee, nor even to the mortgagor. Moreover, a Statute (Revised L. 192) provides, that a tenant shall not attorn to a *stranger*. Therefore, D could not lawfully attorn to any one but C or his grantee, and E holding under an execution sale against C, was to be regarded as his grantee ; while on the other hand, B was to be held a *stranger*. Nor was the attornment to B justified by the statutory provision, which excepts mortgagees from the general prohibition of attornment ; for this merely leaves attornment to a mortgagee, to be valid or void according to the circumstances of the case, but does not justify attornment to any but the grantee of the landlord.³

34. It was once held, that where a leasehold is assigned by way of mortgage, the mortgagee does not, like other assignees, become liable to the covenants of the lease *immediately*, but only after entry. But the law seems to be now settled otherwise. To guard against this consequence of an assignment, it is usual to mortgage a term by way

¹ *Newall v. Wright*, 3 Mass. 138. (See 1 Edw. 399).

² *Lane v. King*, 8 Wend. 584.

³ *Souders v. Vansickle*, 3 Halst. 314. *M'Kircher v. Hawley*, 16 John. 289. (See 5 N. H. 529).

of underlease. But the mortgagee thereby loses the right of *renewal*, which he would have as assignee. The mortgagee is liable only for rent due after the mortgage is made, not for prior instalments.¹

35. A mortgagee in possession, being the legal owner of the inheritance, has power at law to commit *waste*. But a Court of Chancery will restrain him from doing it, unless the security is defective, or will decree an account of the trees cut down, and an application of the proceeds to pay first the interest, and then the principal of the mortgage debt.² In Maine, a question has been made, whether a mortgagee after entry may cut and carry away for sale, timber and other trees.³

36. A mortgagee in possession cannot make a lease of the land to bind the mortgagor, unless there be an absolute necessity for it;* and if the mortgagor bring a bill in Equity for reconveyance, and tender the amount due, although the mortgagee set up such lease in his answer, and offer to reconvey upon the plaintiff's assenting thereto, a reconveyance will be decreed free from this condition.⁴

CHAPTER XXXI.

EQUITY OF REDEMPTION—NATURE OF THE ESTATE—WHO MAY REDEEM, ETC.

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|---|---|
| 1. Distinction between an equity and a trust.
2. Mortgagor has seisin.
3. Curtesy.
4. Dower.
8. Whether assets.
9. Subject to legal process.
12. Who may redeem.
13. Subsequent incumbrancers.
16. Dowers, &c.—on what terms. | 22. The Crown.
23. Whole debt must be paid.
25. Tacking.
29. Unknown in U. S.
30. Future advances, &c.
38. Time of redemption.
43. No redemption in case of <i>fraud</i> .
45. Terms of redemption—account—repairs—interest, &c. |
|---|---|

1. An Equity of redemption has been held to resemble a *trust*. But in some respects the rights of a mortgagor are better protected by the law than those of a cestui. A trust is said to be created by the contract of the party, and therefore subject to his directions. But an

¹ *Eaton v. Jacques*, Doug. 457. *Williams v. Bosanquet*, 1 Brod. & B. 236. 2 Cruise, 103, n. a. 1 Pow. on Mort. 197, n. 1. 2 Green, 132. 2 Paige, 68, 586. *McMurphy v. Minot*, 4 N. H. 251.

² 2 Vern. 392. Sel. Cas. in Chan. 30. 2 Cruise, 81.

³ *Blaney v. Bearce*, 2 Greenl. 132. 5 N. H. 252. (See *infra* ch. 31).

⁴ *Hungerford v. Clay*, 9 Mod. 1.

* Otherwise by the civil law. 1 Dom. 356.

Equity of redemption is *inherent in the land*, and, as has been seen, not liable to be impaired even by express restrictions. It is in fact the creature of a Court of Equity, and not an interest reserved by the parties. The former, anciently, did not bind a party coming to the estate *in the post*; while the latter adhered to the estate into whose hands soever it might come.¹

2. A mortgagor, after breach of condition, if in possession, has, in the view of a Court of Equity, an equitable seisin equivalent to a legal seisin in the view of a Court of Law. Hence his estate is subject to conveyance, devise, descent, entailment, mortgage, and to be charged with an annuity. It is not *a mere right*, but *an estate in the land*, whereof in Equity there may be a seisin. The mortgage itself being only a *chose in action*, unless the ownership of the land is in the mortgagor, it is in nobody. The interest of the latter is no otherwise a right of action than every *trust*, which, though not to be executed but by *subpœna* out of Chancery, is still regarded as real estate.² In South Carolina and Pennsylvania, the right of redemption is not an equitable but a strictly legal right.³

3. On the same principle, an Equity of redemption is subject to *curtesy*, if the wife is in possession of the land during coverture. For though such possession is a mere tenancy at will, it is in Equity that of *the real owner*, subject only to a pecuniary charge. Nor is the husband to be deprived of curtesy on the ground of laches, in not paying off the mortgage and thereby acquiring an absolute title, by analogy to the rule which requires of him actual entry upon a legal estate of the wife; for the payment of a mortgage is a far more difficult matter than a mere entry upon land, besides that the mortgagee is entitled to notice, before he is bound to accept such payment. Upon these grounds, a decision of Sir Joseph Jekyll, disallowing curtesy in an Equity of redemption, was reversed by Lord Hardwicke.⁴

4. But, in England, an Equity of redemption is not subject to *dower*. In this respect, it is placed on the same footing with a *trust*.⁵ (See p. 224). In one case (*Banks v. Sutton*),⁶ the Master of the Rolls said, he did not know or could find any instance, where dower of an Equity of redemption was controverted and adjudged against the dowress, and decreed in favor of the claim. But afterwards (in *Attorney General v. Scott*),⁷ Lord Talbot made a contrary decision, which has been since uniformly adhered to. And no peculiar equities on the part of the wife will operate to change the rule in her favor; as, for instance, the facts, that the husband expressed his expectation and desire that she should have dower, and was so instructed

¹ P. 270. Hard. 469. 17 Ves. 133. 2 Cruise, 88.

² 2 Cruise, 113. 2 Abr. Eq. 728. 1 Atk. 603. *Ellithorp v. Dewing*, 1 Chip. 141.

³ 4 McCord, 340. *Anderson v. Neff*, 11 S. & R. 223.

⁴ *Casborne v. Inglis*, 2 Abr. Eq. 728. 1 Atk. 603.

⁵ 2 Cruise, 122.

⁶ 2 P. Wms. 719.

⁷ For. 138. 1 Cruise, 444.

by the person who drew his will ; that the wife is left for the most part otherwise unprovided for ; and that certain articles of luxury, such as a coach and horses and plate, are bequeathed to her, for which she can have no use without dower to support her.¹

5. In the United States, the English rule is not adopted. It has been seen, (p. 225), that in several of the States, dower is allowed, by express statute, in all *equitable* estates ; and decisions to the same effect, in regard to equities of redemption, have been made, in New York, Connecticut, and Massachusetts. Chancellor Kent says, that dower is allowed in equities of redemption in Massachusetts, New York, Connecticut, New Jersey,* Pennsylvania, Virginia, Alabama, Indiana, and probably most or all of the other States.²

6. Thus, if the executor, &c. of the husband redeem the mortgage, the widow shall have dower.³

7. Even in England, where a mortgage is made *for years*, and not in fee, dower is allowed in the Equity of redemption. If the mortgage has been satisfied, Chancery will remove the term for the benefit of the widow ; if not, she will be bound to pay one third of the interest or of the principal.⁴

8. In England, an Equity of redemption is not legal assets in the hands of the heir, but he may plead "*riens per descent.*" But since the Statute of Frauds, like a trust, it is held to be assets in Equity ; but only to pay debts of that description, to which the land would have been liable, if it had been a legal estate. Where the mortgage is made for years, the Equity, being incident to the reversion in fee, is, like the latter, *legal assets.*⁵

9. Equities of redemption are, universally made subject to legal process for the debts of the mortgagor. This subject will be considered hereafter.

10. On the other hand, the interest of a mortgagee cannot be taken upon execution before foreclosure.⁶†

11. Although an equity of redemption is liable to be taken on execution by third persons, it has been held in Massachusetts, that the mortgagee himself shall not be allowed to take it upon a judgment recovered for the mortgage debt ; because a shorter time is allowed for redeeming an equity, sold on execution, than for redeeming the land itself.⁷

12. With regard to the persons who are entitled to redeem, it is of course to be understood, that any party in whom the law vests an

¹ Dixon v. Saville, 2 Cruise, 117.

² 13 Mass. 227, 525.

³ 2 Cruise, 123-4.

⁴ 1 Pow. 255, n. 1. (See ch. 32).

⁵ Atkins v. Sawyer, 1 Pick. 351.

⁶ In this State, a contrary doctrine was formerly held. 1 South. 200.

⁷ It was formerly held otherwise in Connecticut. 1 Root, 452.

² 4 Kent, 44.

³ 2 Cruise, 123.

equity of redemption, either by its own operation, or by act of parties, may redeem the mortgage; indeed, the latter part of the proposition is a mere repetition of the former, since an equity of redemption is itself nothing else but the right or power to redeem. It seems, any one may redeem a mortgage, who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him.¹

13. Any *subsequent incumbrancer* may redeem; such as a judgment creditor, in those States, where a judgment constitutes a lien on real estate. And in England, the cognizee of a statute, acknowledged after the filing of a bill for foreclosure, has been allowed to redeem even after the foreclosure, if recent; and although the mortgagee had no notice.²

14. In Massachusetts, where an equity of redemption is attached, the owner may still make another mortgage of it, and the second mortgagee, or his assignee, may redeem from the execution purchaser.³

15. On the same principle, the purchaser of an equity of redemption, sold upon execution against the mortgagor, may redeem the mortgage.

16. A dowress or jointress may redeem. So a tenant by the curtesy.

17. In one case, in Massachusetts,⁴ it was doubted, on account of the Court's limited equity jurisdiction, whether a widow could redeem, for the purpose of entitling herself to dower. But it seems to be now well settled that she may. But dower is subject to the rights of the mortgagee, and he may defend against the claim till his mortgage is satisfied.

18. Where a purchaser of the equity of redemption pays the mortgage debt, and takes an assignment of the mortgage, the widow cannot redeem without paying the whole debt. But if another person, claiming under the mortgagor, redeems, she will be entitled to her share of the land, by paying her share of the debt, according to the value of her life interest in one third of the estate.⁵

19. If the purchaser of an equity of redemption takes an assignment of the mortgage, and continues in possession of the land more than three years from such assignment, the condition having been broken before the sale, and then the husband dies, the widow may redeem, unless she has had notice of his being in possession for condition broken. And in such case, the defendant shall account only for rents received, and be allowed only for repairs made, since the husband's death.⁶

20. A mortgagor devised the estate mortgaged to his son, who died,

¹ 5 Pick. 149. 9 John. 591, 611. 9 Mass. 422. 4 Kent, 156.

² Crisp v. Heath, 7 Vin. Abr. 52. 2 Litt. 334.

³ Bigelow v. Willson, 1 Pick. 485. (See ch. 32).

⁴ Bird v. Gardner, 10 Mass. 364.

⁵ Van Dyne v. Thayer, 14 Wend. 233. Gibson v. Crehore, 5 Pick. 146. 5 John. Cha. 482. Cass v. Martin, 6 N. H. 25.

⁶ Eaton v. Simonds, 14 Pick. 98.

leaving a widow. The executor sold the equity, purchased it himself, and redeemed the mortgage, paying one half of it with assets in his hands as executor, according to the directions of the will, and the rest with his own funds. The sale was affirmed by the son's widow and heirs. Held, the widow should have for her dower the interest for her life of one third of the price of the equity, and one third of the amount paid from the testator's estate to extinguish the mortgage.¹

21. A mortgaged land, his wife, B, joining, to release her dower. After the death of A, his administrator sold the equity of redemption to C, who took possession of the land. C then paid the mortgage debt, took an assignment of the mortgage, and afterwards made a declaration that he held for the purpose of foreclosure. B had no notice of his purpose to foreclose, and brought a bill in equity to redeem. Decreed for the plaintiff, and that the defendant should account from the time of assignment.²

22. In England, the crown may redeem a mortgage on an estate forfeited for crime.³

23. A party interested cannot redeem a mortgage, without paying *the whole debt*; and if he has only a partial interest in the property, he will stand in the place of the party, whose interest in the estate he discharges. In carrying into effect the right of redemption, Equity may *marshal* the burden among the respective claimants, according to their respective proportions.⁴

24. One person, having a partial interest in property mortgaged, cannot compel other owners to contribute for its redemption; because a foreclosure may perhaps be for their benefit. But if he redeem alone, he may hold over the whole till he is reimbursed. He is an assignee, and stands in the place of the mortgagee. So, if one of several mortgagees, in a subsequent mortgage, elects not to pay his share in redeeming a prior one; the others, who do redeem, have a prior lien for the sum paid, and may in Equity compel the former to pay his share, or convey his interest to themselves.⁵

25. In England, upon the maxim, that "he who will have equity must do equity," it has been held, that a mortgagor cannot redeem the mortgaged estate without paying, not only the mortgage debt, but a subsequent bond given by him to the mortgagee for money borrowed. But this doctrine was not adhered to with respect to the mortgagor himself. It is, however, still retained, as against *the heir or devisee* of the mortgagor, for a bond debt of the ancestor becomes his own, and the descended estate is assets in his hands; and therefore he will not be allowed to redeem without paying it.⁶

26. The same doctrine has been applied, where a person, having loaned money upon land, afterwards takes an assignment of a mort-

¹ Jennison v. Hapgood, 14 Pick. 345.

² 2 Cruise, 127.

³ 5 Pick. 152. 16 Pick. 153. Saunders v. Frost, *ib.* 269. (See Brooks v. Harwood, 8 Pick. 497. 1 Verm. 28).

⁴ Gibson v. Crehore, 5 Pick. 146.

⁵ 4 Kent, 162-3-4. 2 Root, 333.

⁶ 2 Cruise, 127-134.

gage made by the borrower. So, if part of a debt is paid, and more money borrowed upon a defective security, the mortgagor shall not redeem without paying the whole amount due.

27. But the principle is not adopted, as against an assignee of the equity of redemption, or any subsequent incumbrancer; who may always redeem, without paying any independent claim held by the mortgagee against the mortgagor.

28. Where one makes two distinct mortgages of separate estates, one of which proves defective in title or value; neither he, nor a purchaser of one of the estates, holding under him, will be allowed to redeem one without redeeming both.¹

29. The rules above stated, by which Equity imposes upon a party, who seeks its aid in redeeming a mortgage, terms that are not provided for by the mortgage itself; have been said to be, in some particulars, solely matter of arrangement, to prevent a circuitry of suits, and to have no foundation in natural justice. They are strikingly at variance with the *registration system* universally practised upon in the United States, and, chiefly on this ground, perhaps, have never been generally adopted as a part of American law. Thus, in Massachusetts, a creditor of the mortgagor, purchasing the equity of redemption at an execution sale, cannot insist upon payment of his debt as a condition of the mortgagor's redeeming his equity.² In Maryland, the Court, in one case, as a mere dictum, recognised the English rule, as applicable where a mortgagor seeks to redeem, though not where a mortgagee brings a suit to foreclose. But the point was not distinctly decided. The same has been done in Connecticut.³

30. In this connexion, we may consider the question, which has been somewhat discussed, how far a mortgage may be made to operate as a security, for future advances made, or liabilities incurred, by the mortgagee. The principle is, that subsequent advances cannot be tacked to a prior mortgage, to the prejudice of a *bona fide* junior incumbrancer; but a mortgage is always good to secure future loans, when there is no intervening equity. In other words, where a mortgage is expressly made to cover future debts, these debts will be covered by it, in preference to the claim of a third person, who takes another mortgage between the making of the first and the incurring of the proposed future debts, with notice express or implied of the first mortgage.⁴

31. To render a prior mortgage valid against subsequent incumbrances, the condition of the former need not be so completely certain, as to preclude the necessity of extraneous inquiry, but only sufficiently definite to give the necessary information, with the exercise of common prudence and diligence.

¹ 2 Cruise, 127-134. 3 Bro. 162.

² Loring v. Cooke, 3 Pick. 48.

³ 5 Gill & J. 21-2. 2 Swift, 186-7. 3 Conn. 213.

⁴ 4 Kent, 175. 2 Cow. 292. 2 John. Cha. 309.

32. A mortgage from A to B, dated May 18, was conditioned as follows—"whereas B has endorsed for A a note for \$1000, and has agreed to endorse \$1000 in a note or notes, hereafter, when thereto requested;" if A shall pay said notes, the deed to be void. June 16, B endorsed a note for A for \$1000, which B was afterwards obliged to pay. In November, A mortgaged the same land to C, a *bona fide* creditor. On a bill for foreclosure by B against C, held, the mortgage was a valid security for the second note.¹

33. Condition of a mortgage from A to B; that if A shall pay B the sums to be advanced him by B, according to an agreement mentioned in a certain bond of even date from A to B; and fulfil every other agreement mentioned in said bond, and build the bridge therein mentioned, and do all other things contained therein; the deed and bond to be void. A afterwards mortgages to C. Held the mortgage to B should stand as security for advances made after the mortgage to C.²

34. A mortgaged to B, conditioned nominally to secure a certain specified sum, but in reality to secure different sums due at the time, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. Held, although the misrepresentation of the true condition subjected the mortgage to suspicion, yet, as it proved, on inquiry, to be a fair transaction, the mortgagee's claim was good, not only for debts due at the time, but for those subsequently incurred upon the faith of the mortgage, as against all persons except those injured and deceived by the misrepresentation; but that it should not hold to secure advances made after notice of a subsequent conveyance by, or incumbrance against the mortgagor.³

35. In Maryland, the validity of a mortgage to cover future advances seems to be recognised, though not distinctly decided. So in South Carolina. But in New Hampshire, a late statute seems to render it void.⁴

36. The Court in Massachusetts have remarked,⁵ that a stipulation in a mortgage for the security of future advances and responsibilities, may have a fraudulent aspect, or may be satisfactorily explained according to the attending circumstances. A mortgage made for this consideration alone might be void against creditors, as tending to facilitate collusion, and enabling the mortgagor to get credit on his property without notice of the incumbrance. But where the object is to secure an existing demand, the addition of a clause, securing future advances, does not necessarily avoid the mortgage. These remarks are evidently directed to the point, whether such a mortgage is *void*

¹ Hubbard v. Savage, 8 Conn. 215.

² Crane v. Deming, 7 Conn. 387. (See 9 Ib. 286).

³ Shirras v. Caig, 7 Cranch, 34, 50-1.

⁴ Union, &c. v. Edwards, 1 Gill & J. 363. Clagett v. Salmon, 5 Ib. 314. 1 McCord's Cha. 265. N. H. L. 1829, 532.

⁵ Badlam v. Tucker, 1 Pick. 398. (2 T. R. 462). See 7 Vin. Abr. 52-3.

for the whole ; not whether it is effectual to cover the future advances. In another case, Judge Story remarks,¹ that a conveyance may be valid in point of law, although given for future advances, if it be *bona fide* and for a valuable consideration ; that this will hardly be denied, and has been most solemnly settled.

37. But a mortgage, conditioned to pay all notes which the mortgagee may give or endorse for the mortgagor, and all receipts which he may hold against him, is void against creditors of the mortgagor.² So, a mortgage conditioned to indemnify the mortgagee against a certain note endorsed by him, and all other notes thereafter endorsed by him for the mortgagor's benefit, not exceeding a certain sum, was held void with respect to the latter notes against a subsequent incumbrancer.³

38. With regard to the time within which a mortgage shall be redeemed, although no precise period of limitation is fixed by law, and matters in Equity are governed by the course of the Court, yet, in analogy to the Statute of Limitations, an uninterrupted possession by the mortgagee for twenty years,* will raise a presumption that the right of redeeming is abandoned, more especially as against the heir of the mortgagee. So, where there has been a decree to redeem and account, the lapse of twenty years after such decree, the mortgagee being in possession, will be a bar to redemption. But the same disabilities—coverture, infancy, imprisonment, and absence from the country—which make an exception to the rule of limitation at law, will also save an equity of redemption from being barred in Equity. But not an *absconding*, which is an avoiding or retarding of justice. And in Equity, as at law, where twenty years had elapsed in the life of the ancestor, no subsequent disability in the heir will take the case out of the rule of twenty years' limitation. Where a bill for redemption itself shows that the mortgagee has had possession about twenty years, it has been held, (though since denied), that the latter need not plead the limitation, but may demur to the bill. In Equity, as at law, in case of disability, the party will, it seems, be allowed not twenty years, but only ten years, after its removal.⁴

39. The limitation above referred to being founded chiefly upon the difficulty of a mortgagee's accounting after a long continued possession, it is not applicable, where an account has been settled within twenty years. Thus, after there had been four descents on the part of the plaintiff, and three on the part of the defendant, but the mort-

¹ De Wolf v. Harris, 4 Mas. 530.

² Pettibone v. Griswold, 4 Conn. 158.

³ Shepard v. Shepard, 6 Conn. 37.

⁴ 2 Sumn. 401. 3 Atk. 225. 2 Cruise, 135-6. 1 Ch. Rep. 286. 2 Vent. 340. Ashton v. Milne, 6 Sim. 369. St. John v. Turner, 2 Vern. 418. Cornel v. Sykes, 1 Cha. R. 193. Knowles v. Spence, 1 Ab. Eq. 315. Jenner v. Tracy, 3 P. Wms. 267 n. Belch v. Harvey, 3 P. Wms. 287 n. 1 N. J. R. C. 412.

* It will be seen, that the legal time of limitation is changed in many of the States. The rule in Equity varies accordingly.

gagee, within twenty years, upon a bill for foreclosure, had made up an account; a redemption was decreed. So, where there had been a stated account, with an agreement to turn interest into principal—although the mortgagee had been in possession forty years. So, where within twelve years the clerk of the mortgagor's solicitor had settled an account of what was due, in order to pay off the mortgage, though no farther proceedings were had.¹

40. Upon a similar principle, any deliberate act of the mortgagee, done within twenty years, by which he recognises the existence of the mortgage as such, will prevent the equity from being barred by lapse of time. Thus, where a mortgagor twenty-three years after the mortgage made a will, devising that if the mortgage should be redeemed, the money should go in a certain way; and sixteen years after the will, the mortgagor being dead, his heir brought a bill to redeem; a redemption was decreed.²

41. So, an acknowledgment by the mortgagee, in an answer in Equity, that the mortgage still subsists as such, is sufficient to preserve the right of redemption from being barred by lapse of time. But the acknowledgments of a mortgagee, made after he has transferred his interest, will not bind a purchaser without notice.³

42. Although the rule above stated as to the extinguishment of an equity of redemption by lapse of time is well established, yet it is said, that the relation between mortgagee and mortgagor is so far analogous to that of trustee and cestui que trust, that the possession of either party is, as to the other, *amicable*, not *adverse*, unless the former show an unequivocal intent to the contrary. Therefore, the statute of limitations does not run against the party out of possession. A mortgagor cannot *disseise* the mortgagee. So even where a mortgagee attempts to convey an absolute title, this is no disseisin of the mortgagor, but passes merely a defeasible estate.⁴

43. A Court of Equity will not aid a mortgagor in redeeming his estate, where such redemption would be a violation of good faith on his part, and an injury to the mortgagee, who has relied upon his statements and promises.

44. A, a mortgagor, encouraged B to purchase the mortgage from the mortgagee, C; saying, that the land was not worth more than the debt, and that he would never redeem. B purchased the mortgage, and made expensive improvements upon the land. Held, A should not be allowed to redeem.⁵

45. With regard to the terms upon which a mortgagor may redeem

¹ 1 Sum. 109. *Procter v. Cowper*, 2 Vern. 377. *Conway v. Shrimpton*, 5 Bro. Parl. 187. *Barron v. Martin*, 19 Ves. 327. 2 Cruise, 108.

² *Orde v. Smith*, Sel. Cas. in Chan. 9.

³ *Dexter v. Arnold*, 1 Sumn. 109. 3 Mur. 218.

⁴ *Fenwick v. Macey*, 1 Dana, 279. *Dexter v. Arnold*, 2 Sumn. 109.

⁵ *Fay v. Valentine*, 12 Pick. 40.

his estate, or the respective claims and allowances between him and the mortgagee, the general principle is, that a mortgagee in possession is a *steward* or *bailiff* of the mortgagor, and accountable to him for all the profits of the land. In general, however, he is not responsible for all that might have been made from it, but only for the actual receipts; unless guilty of some gross neglect or wrong, as by rejecting a good tenant or admitting an insufficient one.¹

46. But where the mortgagee enters before condition broken, it seems the law will hold him to a very strict account of the rents and profits, such entry being regarded as a harsh proceeding, contrary to the intention of the transaction, and unwarranted by any default of the mortgagor. In Massachusetts, the mortgagee, in such case, shall account for the *clear rents and profits*.²

47. If it be proved, that the land was let by the mortgagee for a certain rent, it will be presumed that it was leased for the whole time on the same terms, unless the contrary be shown. And if he has kept no account of the rents, he is chargeable with what he may be presumed to have received; and, if he himself occupy, with an occupation rent.³

48. If the mortgagee either enters on the land, but allows the mortgagor to take the profits, or permits him to use the mortgage for keeping off other creditors, he will be held accountable for the profits.⁴

49. If the mortgagee assign his mortgage, he is answerable for the profits, both before and after the assignment. An assignee cannot excuse himself from accounting, by setting up an adverse title.⁵

50. The mortgagee, in general, can claim no compensation for his own trouble in receiving the rents. And even a special agreement therefor will be disallowed. But for the necessary services of an agent, he may have an allowance. And in Massachusetts he is allowed a commission of five per cent. for his own trouble in the collection of rents.⁶ But if he occupy himself, he shall not have, for his care of the estate, any commission on the rent with which he is charged.⁷

51. A mortgagee shall account for all loss by gross negligence or wilful default, in bad cultivation and omission to repair.

52. So also, he shall account for *waste* committed by him. But the English doctrine of waste is subject to the same modifications, as between mortgagor and mortgagee, which have already been stated in relation to landlord and tenant, (p. 171).⁸

¹ 1 Vern. 45. 2 Atk. 534. 1 Abr. Eq. 328.

² Mass. Rev. St. 635.

³ Sel. Ca. in Cha. 63. *Dexter v. Arnold*, 2 Sumn. 109.

⁴ 1 Vern. 270. *Chapman v. Tanner*, 1b. 267.

⁵ 1 Abr. Eq. 328. *Gordon v. Lewis*, 2 Sumn. 143.

⁶ 1 John. Cha. 385. 2 Mar. 339. 5 Pick. 146.

⁷ (*Tucker v. Buffum*, 16 Pick. 46.) *Eaton v. Simonds*, 14 Pick. 98.

⁸ *Givens v. McCalmont*, 4 Watts, 460. *Bland*, 22 n.

53. The mortgagee shall not be required to account for the proceeds of improvements made by himself.¹

54. The mortgagee will be allowed for all necessary repairs, and for the expenses of defending the title to the land, both of which claims shall bear interest;* and he will be allowed for necessary repairs and betterments, though the expense exceed the rents and profits.²

55. He will not be allowed for the clearing of wild lands, nor for any ornamental improvements or new erections, unless absolutely necessary for the upholding of the estate, or permanently beneficial; such as an aqueduct requisite for supplying the premises with water; nor will he be allowed for insurance.³

56. In Maryland, a mortgagee is allowed for permanent improvements.⁴

57. It seems, there is no universal duty in a mortgagee to make all sorts of repairs; but he is bound to make such as are reasonable and necessary under the particular circumstances of each case. If a building is very old and dilapidated, there is no rule requiring him to incur a greatly disproportionate expense in repairing; and he certainly is not bound to make any new advances. But he is not allowed for improvements, unless they increase the value of the estate.⁵

58. The mortgagee shall not get any advantage from the mortgage fund, beyond the principal and interest of his debt. It is the general rule, that where a mortgagee receives a sum exceeding the interest due, it shall go to sink the principal. But in decreeing an account, it seems, the Court of Chancery will not require that every trifling amount be thus applied; or, in all cases, even that annual rests be made. It takes into view the hardship upon the mortgagee, of being obliged to enter and receive his debt in fractions, and obtaining no allowance for his care and trouble, though treated as a bailiff in his liability to account. In general, the mortgagee will be liable for an excess of the interest received by him over the interest of his debt. But it will be otherwise where he retains it, after satisfaction of his debt, by mistake. The party, claiming to redeem, shall allow interest upon the money which he tendered, and which the defendant refused to accept.⁶

59. Where surplus rents remain in the hands of the mortgagee

¹ *Moore v. Cable*, 1 John. Cha. 385.

² 2 Sumn. 125-6, 143. 3 Atk. 518. *Reed v. Reed*, 10 Pick. 398.

³ *Moore v. Cable*, 1 John. Cha. 385. 10 Pick. 398. *Russell v. Blake*, 2 Pick. 506. *Saunders v. Frost*, 5 Pick. 259. 5 H. & John. 312.

⁴ *Bland*, 22 n.

⁵ *Dexter v. Arnold*, 2 Sumn. 125-6. *Gordon v. Lewis*, *ib.* 143. *Reed v. Reed*, 10 Pick. 198.

⁶ 2 Atk. 534. *Gordon v. Lewis*, 2 Sumn. 143. *Tucker v. Buffum*, 16 Pick. 46.

* By the civil law, he is allowed for improvements not absolutely necessary, with interest. 1 Domat, 365.

after satisfaction of his debt, they constitute a *chose in action*, which may be assigned by the mortgagor; and the assignee may maintain a bill for an account.¹ If the mortgage is accompanied with a *power of sale* to the mortgagee, the surplus to be paid to the mortgagor, his executors and administrators; if the land is sold in the mortgagor's life-time, the surplus will be personal estate; if after his death, the equity will descend to his heirs, and the surplus will pass along with it.² In New York, the surplus of proceeds of sale passes to heirs, and is assets.³

60. Upon a bill in equity, to redeem an equity of redemption sold on execution, the defendant shall account for the rents and profits, though before suit commenced the plaintiff tendered him the amount of the purchase money, which he paid for the equity, without deducting the rents and profits.⁴

61. Where such purchaser, after the tender, occupied under a lease from the mortgagee at a low rent, and afterwards purchased the mortgage, held, he should account for the fair annual value of the land, with an allowance for repairs and improvements.⁵

62. In Maine and Rhode Island, the mortgagor will be entitled to redeem, by paying or tendering the debt due, with interest and costs, or performing or tendering performance of any other condition of the mortgage, together with the amount of reasonable expenses incurred in repairs and betterments, over and above the rents and profits. And in Maine, if the mortgagor have paid money to the mortgagee, or brought it into Court, without deduction on account of the rents and profits received by the mortgagee, he shall be entitled to a restitution of the balance due him on this account. In Massachusetts, if the mortgagee, or any one under him, has had possession, he shall account for the rents and profits, and be allowed for reasonable repairs and improvements, for taxes and assessments, and other necessary expenses in the care and management of the estate. If there is a balance due him, it shall be added to the amount which the mortgagor is to tender; if there is a balance due from him, it shall go to sink the debt.⁶ In Georgia, a mortgagee is made liable for taxes upon the land, if the mortgagor does not pay them.⁷

¹ 2 Sumn. 143.

² Wright v. Rose, 2 Sim. & St. 393.

³ Moses v. Murtagoyd, 11 John. Cha. 119.

⁴ Tucker v. Buffum, 16 Pick. 46.

⁵ Ib.

⁶ 1 Smith's St. 160-1-4. Mass. Rev. St. 636.

⁷ Prince, 848.

CHAPTER XXXII.

MORTGAGE—ESTATE OF A MORTGAGEE—SUCCESSIVE MORTGAGES OF THE SAME LAND.

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|---|---|
| 1. Mortgage—personal estate—passes to executors, &c.
4. Devise.
8. American doctrine.
11. Assignment of mortgage is the transfer of an estate.
13. Mortgage and debt may be separated.
16. Interest of mortgagee, not liable to execution.
19. Statute of Limitations, and lapse of time. | 22. Insurance.
23. Second mortgage—general principles.
24. Rights of not affected by transactions between first mortgagee and mortgagor.
26. Assignment of first mortgage.
27. Mortgage to several persons by one deed.
30. Equitable interference for subsequent mortgagee.
31. Fraud. |
|---|---|

1. A MORTGAGE, though conveying a fee simple, yet being a mere security for a debt, is *personal estate*, so long as the right of redemption continues. Hence, upon the mortgagee's death, it passes to his executors, not to his heirs, and is primarily liable for debts. And it may be devised without the formalities necessary to a will of real estate.* In Rhode Island, it is said, if the mortgagee dies without *taking possession*, the mortgage passes to his executors, and the heirs need not be made parties in a bill to redeem.¹

2. Though the heir of the mortgagee be in possession after condition broken, and no want of assets, he shall be decreed to convey to the administrator.²

3. In Massachusetts, Rhode Island, Michigan and Maine,³ statutes provide, that the executor, &c. of a mortgagee may recover possession of the land, and hold it as assets, and be seised to the use of the heirs, widow or devisees, in Maine, and, in Massachusetts, of creditors also, or the same persons who might claim the money if paid to redeem the land. In Massachusetts and Rhode Island, it may be sold for payments of debts, by license of Court.

4. It has been held, that lands held originally under old mortgages passed by a general devise, though no release of the right of redemption was shown; and that there was no equity between the executor

¹ Treat. of Eq. B. 3, c. 1, s. 13. Cooke, 344. 13 John. 537. 5 Pick. 112. (But see 10 Price, 78. McClelland & Y. 292.)

² 1 Sumn. 109.

³ Ellis v. Guayas, 2 Cha. Ca. 50.

⁴ 1 Smith's St. 166-7. Mass. Rev. St. 430. R. I. L. 233-4. Mich. L. 57.

* So, by the civil law, the mortgage is an accessory, and in every thing follows the debt, which is its principal. 1 Domat, 366.

and the heir or devisee, requiring any change of the property from its condition at the death of the deceased owner.¹

5. But if the mortgagee indicate an intention to pass the mortgage as real estate, the law will so treat it.* Thus, where he devises it to his daughter *and her heirs*, the husband of such daughter, upon her death, shall not hold it as personal property, but it shall go to her heirs.² And it seems to be now settled, that a mortgage will pass by will, under general words relating to the realty, unless the expressions of the will, or the purposes and objects of the testator, call for a different construction.³

6. If the mortgagee, after a decree for foreclosure, but before an account taken or actual foreclosure, devise the mortgage to a relation to whom he is indebted in a smaller sum, this is no satisfaction of the debt, being regarded as a devise of real estate.⁴

7. But in such cases, although, as between devisor and devisee, the mortgage is held to be real, yet for payment of debts it is held to be personal assets, in case of deficiency.⁵

8. The doctrine above stated seems to have been fully recognised in New York by Kent J. He says, the estate in the land is the same thing as the money due on the note; is liable to debts; goes to executors; passes by a will not conformable to the Statute of Frauds; is transferred or extinguished by an assignment, or even a parol forgiving of the debt. The land is but appurtenant to the debt. Whoever owns the latter, is likewise owner of the former. There must be something peculiar in the case, some very special provision of the parties, to induce the Court to separate the ownership of the note from that of the mortgage. In the eye of common sense and of justice, they will generally be united. Upon these grounds, Judge Kent held, that *the delivery* of a mortgage, accompanying the endorsement of a note, which it was made to secure, passed the mortgage as well as the note. Radcliff J., on the other hand, held, that the legal title to the land did not pass, although the assignee acquired an equitable interest, which a Court of Equity would sustain. That although, as *between mortgagor and mortgagee*, the mortgage was to be regarded as personal estate, so as to pass to executors, or be extinguished by payment of the debt; yet it could not be so regarded, in reference to a transfer to third persons. In a subsequent case, Judge Kent adheres to his former doctrine, that at law, as well as in Equity, the mortgage is regarded as a mere incident attached to the debt. The same rule is adopted in Pennsylvania. In Maryland, a mortgage, containing a power to sell, may be assigned by endorsement in blank.⁶

¹ Att'y. Gen. v. Bowyer, 5 Ves. 300.

² Noys v. Mordant, 2 Vern. 581.

³ Jackson v. Delancy, 13 John. 555. Braybroke v. Inskip, 8 Ves. 407.

⁴ Garret v. Evers, 2 Cruise, 85.

⁵ Ib.

⁶ Johnson v. Hart, 3 John. Cas. 329-30. Ib. 326-7. Jackson v. Willard, 4 John. 43. 2 Rawle, 242. Md. St. 1836, ch. 249, s. 15.

* This is not in analogy with the rule, by which a bequest of a chattel to one *and his heirs*, passes it to his executors, or that, by which mortgage money, though secured to heirs, goes to executors. 2 Cha. Cas. 51.

9. But in New Jersey it has been held, that the principle, that a mortgage is a mere incident to the debt which it is designed to secure, does not dispense with the necessity of a formal assignment of the former, to a party who pays and takes up the latter, in order that he may defend against a suit for the land by the mortgagor. And where an informal assignment was first taken, another formal assignment, made after commencement of suit, will be ineffectual as a defence to the action. In such case, the mortgagee holds the mortgage *in trust* for the party who pays the debt, but the latter has no legal title.¹

10. In Massachusetts, no interest in a mortgage deed can be transferred without a written and sealed assignment. The assignment of a note does not pass the accompanying mortgage. In New Hampshire, it is said, a mortgage passes nothing, unless it appears that the debt secured also passed, or was in the power of the mortgagee. But the debt carries the mortgage with it.²

11. Although a mortgage, in most respects, is treated as a mere security accompanying the debt; yet the assignment of a mortgage is held to be the conveyance of an estate, and not the mere transfer of a security. Hence, the assignee must bring an action, if at all, in his own name.³

12. But if the mortgagor is disseised, the mortgagee is also disseised, and cannot convey his interest.⁴

13. Although the mortgage, and the debt which it accompanies, are deemed so closely connected, that the former takes its personal character from the latter; yet they may be separated by the act of the mortgagee in transferring the debt.* Where negotiable notes are secured by mortgage, and assigned without the latter, the mortgagee becomes a trustee for the assignees, and holds the mortgage for their benefit.⁵

14. Where a mortgage is given to secure several bonds, and the mortgagee assigns a part of the bonds at different times and to different persons, and the mortgaged premises are afterwards sold upon execution in favor of the mortgagee against the mortgagor; the proceeds of sale shall be applied in payment of all the bonds *pro rata*, as well those which the mortgagee himself retains, as those which he has transferred. The principle "*qui prior in tempore, potior est in jure*" is not applicable to this case, because it relates only to successive charges upon *the same property*, whereas the several bonds in this case are distinct things, and, if the respective dates of the transfers were open to inquiry, great uncertainty and fraud would be likely to ensue. The mortgagee himself has equal rights with the assignees, because the assignment involved no transfer of the mortgage, unless by implication, and no warranty express or implied.⁶

¹ Den v. Dimon, 5 Halst. 156.

² Warden v. Adams, 15 Mass. 233. 17 Mass. 419. Bell v. Morse, 6 N. H. 205. 5 N. H. 420. (But see 8 Pick. 490).

³ Gould v. Newman, 6 Mass. 239.

⁴ Crane v. March, 4 Pick. 131.

⁵ Poignard v. Smith, 8 Pick. 272.

⁶ Donley v. Hays, 17 Ser. & R. 400.

* But see p. 301.

15. This decision was made by a majority of the Court in Pennsylvania. Gibson Ch. J. dissented, on the grounds, that the assignment created a moral obligation upon the mortgagee, which Equity would enforce, though not a legal one; that the debt being the principal, and the mortgage an accessory, the assignment of a part of the debt was an assignment of the mortgage, not *pro rata*, but *pro tanto*, and the assignee a purchaser of all the securities of the assignor, to be used by him as freely and beneficially as by the assignor himself; and that the same principles were applicable to assignees of separate parts of the same debt.

16. It has been already seen (p. 285), that an Equity of redemption is liable to legal process for the debts of the mortgagor. On the other hand, the estate of a mortgagee, before foreclosure or possession taken by him, is not subject to be taken upon execution. Until foreclosure, it is a mere *chose in action*, and an incident attached to the debt, from which it cannot properly be separated. As distinct from the debt, the mortgage has no determinate value; and, if assigned, the assignee's rights must be subject to the holder of the personal security. And the debt cannot be sold with the mortgage, it being well settled that a *chose in action* is not subject to sale on execution.¹

17. These remarks, made by Judge Kent, seem to require not merely *entry*, but *foreclosure*, by the mortgagee, to subject his interest to be taken on execution. The case finds, however, that the mortgagee had not *entered*, and the question stated for decision is, whether a sale is valid, made "before foreclosure, and while the mortgagor is suffered to retain possession." And the learned Judge remarks, that *when the mortgagee has taken possession, the rents and profits may become the subject of computation and sale.*²

18. In Massachusetts and Connecticut it is distinctly decided, that, before entry, the mortgagee's interest is not subject to execution; and doubted, whether it is so subject before foreclosure; because, till that event, all the inconveniences exist which are applicable in the other case. The like decision has been made in Kentucky.³

19. Notwithstanding the principle, that the mortgage is merely incident to the personal security which it accompanies, the Statute of Limitations, applicable to the latter, will not bar a claim upon the former. On the contrary, the recital of the debt in the mortgage deed has been held to take the former out of the operation of the statute.⁴

20. A mortgage was made in 1809, and recorded. The mortgagor transferred the estate. The mortgagee never gave notice of his mortgage to the purchaser; and in 1821 brought a suit for the land, and recovered.⁵

21. But both at law and in Equity, a mortgage is no evidence of a

¹ Jackson v. Willard, 4 John. 43-4.

² Ib. 41-2. Ib. 44.

³ Eaton v. Whiting, 3 Pick. 488. Huntington v. Smith, 4 Conn. 237. 1 Dana, 24-188.

⁴ Clark v. Bull, 2 Root, 329. Lingan v. Henderson, 1 Bland, 282. (See 1 Halst. 473).

⁵ Dick v. Balch, 8 Pet. 30.

subsisting title in the mortgagee, unless he has entered, or the interest has been paid or demanded within twenty years.¹

22. The principle, that the personal security and the accompanying mortgage are incident to each other, does not apply to any merely collateral security, obtained by the mortgagor for the benefit of the estate. Thus, the mortgagee has no claim to a policy of insurance upon the premises, to the exclusion of other creditors. It is a mere personal contract, not attached or incident to the mortgage.²

23. It has already been stated (p. 284), that a mortgagor may mortgage his Equity of redemption, or, as it is commonly expressed, make a second mortgage of the land; and that a second mortgagee stands in the place of the mortgagor, as to his right of redeeming the first mortgage. And the right in Equity of redeeming any number of successive mortgages, may be mortgaged anew.³ It seems to be the universal rule in the United States, that mortgages, like other deeds, take effect in the order of their registration. In England, upon the same principle of *tacking*, by which it has been seen, that a mortgagee may insist upon payment of independent claims against the mortgagor, as a condition of redemption; a third mortgagee may gain priority over a second mortgagee, by buying up the first mortgage and *tacking* it to his own, thereby obliging the second mortgagee to redeem both in order to redeem one.

24. The rights of a second mortgagee cannot be impaired by any transaction, to which he is not a party, between the first mortgagee and the mortgagor; nor, on the other hand, will such transaction operate as an extinguishment of the first mortgage, unless the circumstances plainly demand this construction.

25. A mortgaged to B, afterwards to C, afterwards to D. B and C entered on the same day for condition broken. Afterwards E, a creditor of A, attached his equity of redemption, recovered judgment in the suit against him, and subsequently purchased and took an assignment of B's mortgage. At the execution sale, E afterwards purchased A's equity of redemption, and, after the expiration of a year from such purchase, believing and representing himself to be the absolute owner in fee, conveyed with warranty to F. C, the second mortgagee, tendered to F the amount due upon B's mortgage, at the same time protesting that he considered it as extinguished, and brought a bill in Equity to redeem. Held, 1. That, although, by purchasing the equity of redemption, according to the English law, E might have excluded intervening incumbrances, yet, as the doctrine of *tacking* is here unknown, he acquired no such right. 2. That the right of C to redeem B's mortgage was not reduced, by the sale on execution, from three years to one year, such abridgment of the right of redemption being wholly confined to the relation between the mortgagor and pur-

¹ 4 Paige, 443.

² 8 Mass. 555.

³ *Columbia, &c. v. Lawrence*, 10 Pet. 50.

chaser, and not affecting the claims of other mortgagees, accruing before attachment of the equity, which are not subject to be impaired by any transaction between the mortgagor and his creditors. 3. That the union of the equity of redemption and the first mortgage in the hands of E did not extinguish the latter. Decreed, that on payment of the sum due upon the first mortgage, F should surrender the land, and convey and release his right as the assignee of E.¹

26. An assignment of the prior mortgage to a subsequent mortgagee, does not necessarily operate as an extinguishment of the first mortgage. A mortgagee leased the land. A subsequent mortgagee undertook to discharge the first mortgage, paid the debt, and took an assignment of the first mortgage and the lease, for the purpose of collecting the rent. Held, no extinguishment.²

27. Where a mortgage is made to several persons, to secure debts due to them severally, but giving a partial priority to some over others; they are not to be regarded as prior and subsequent mortgagees, in reference to their respective claims upon the property, but as parties to one deed, with full notice of its terms.

28. To secure pre-existing debts, a debtor mortgaged to three creditors, A, B and C, who were absent and ignorant of the transaction. The sum secured was \$8000, to be paid in the proportion of \$2000 to the mortgagee last named, and to the first and second \$3000 each. At the date of the mortgage, the second and third had advanced the amount of their respective claims, but the first had not. He had since, however, made up the deficiency by further advances. The property being sold on execution under the mortgage, and the proceeds insufficient to pay the whole sum secured; held, they should be distributed according to the sums expressed in the mortgage; that C did not stand as a subsequent mortgagee, but the owner of an interest in common with the others, and under the same title; that he had neither done any act nor relinquished any right, in consequence of the mortgage, to his own prejudice; and that, having affirmed the instrument in part, he was bound by it in the whole.³

29. A second mortgagee succeeds to all the rights of the mortgagor, arising out of any special contract which the latter has made with the first mortgagee, in relation to the land. Thus, if the first mortgagee, having taken a lease of the mortgagor, covenanting to pay rent, refuse to pay the rent to a subsequent mortgagee, when demanded, not having paid it to the mortgagor; the subsequent mortgagee, when he redeems, may compel the first mortgagee to account for the profits, as received towards the payment of his prior mortgage.⁴

30. Where one creditor has two funds, from which he may satisfy his debt, and another has a subsequent lien on only one of the funds, the former creditor will be compelled in Equity to resort to his exclu-

¹ *Thompson v Chandler*, 7 Greenl. 377. (See ch. 33, s. 34.)

² *Willard v. Harvey*, 5 N. H. 252.

³ *Irwin v. Tabb*, 17 S. & R. 419.

⁴ *Newall v. Wright*, 3 Mass. 138.

sive fund, provided it can be done without injury to himself or the debtor. Thus, if A mortgages two estates to B, and then mortgages only one of them to C, the Court will order B to take satisfaction from the estate which is not included in C's mortgage, if sufficient for the purpose. But where there exists any doubt of the sufficiency of this estate, or where the first mortgagee is unwilling to run the hazard of obtaining payment from it, Equity cannot take from him any part of his security till he is fully satisfied.¹

31. In Georgia and South Carolina, a mortgagor who makes a second mortgage, without disclosing, in writing, the existence of the first to the second mortgagee, shall not be allowed to redeem. But the second mortgagee (whose deed is on record, in Georgia,) may redeem the first mortgage. In South Carolina, if a person suffer a judgment, or enter into a statute or recognisance, binding his land, and afterwards mortgage it, without giving notice, in writing, of the prior incumbrance, unless, within six months from a written demand, he clear off such incumbrance, he shall not be suffered to redeem.²

CHAPTER XXXIII.

MORTGAGE—ASSIGNMENT, PAYMENT, RELEASE, ETC. OF MORTGAGES, AND TRANSFERS OF EQUITIES OF REDEMPTION.

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| <p>1. Mortgage cannot be assigned without the debt.</p> <p>2. Assignment cannot prejudice the mortgagor—notice, &c.</p> <p>6. Mortgage an incident to the debt—principle considered—and whether payment revests the estate in the mortgagor.</p> <p>15. Discharging mortgage upon the record.</p> <p>18. Release of equity—whether payment.</p> <p>19. Release of mortgage—release in part.</p> <p>22. Deposit of money with mortgagee—no payment.</p> <p>24. Death of mortgagor does not turn mortgage into payment—practice in case of insolvency.</p> | <p>25. Discharge of execution—not conclusive of discharge of mortgage.</p> <p>26. Payment on mortgage, cannot be applied to other debts.</p> <p>28. Substituting of one security for another, &c.—in general, no payment of mortgage.</p> <p>34. Assignment and discharge of mortgage—when a transfer will be construed as an assignment, and when as a discharge.</p> <p>53. Satisfied mortgage—whether a stranger may set it up.</p> <p>55. Sale by mortgagor with mortgagee's consent.</p> <p>57. Joint release to mortgagee and mortgagor.</p> |
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1. A MORTGAGEE cannot transfer his estate, separate from the debt, either absolutely or for security; especially before it becomes absolute or there has been a foreclosure.³

¹ *Evertson v. Booth*, 19 John. 486-93.

² *Prince*, 161. 1 Brev. 166-7-8.

³ *Aymar v. Bill*, 5 John. Cha. 570. But see p. 297.

2. If the mortgagee assign his mortgage, the assignee can claim only what really remains due upon it when assigned; not what appears to be due. For this reason, in England, it is usual to make the mortgagor a party to such assignment.¹

3. Any payment to the mortgagee after assignment, but before notice of it, will be effectual against the assignee; and it is held, that registration is not sufficient notice of an assignment as against the mortgagor, though it is sufficient to bind subsequent purchasers.²

4. Hence it appears, that all dealings with the mortgagee, even in his character of mortgagee, before notice of the assignment, are valid.³

5. *A fortiori* is this rule applicable, where the mortgagee has assumed to be absolute owner of the land, by having purchased the equity of redemption. Hence if, after such purchase, he assign the mortgage as a subsisting incumbrance, and then convey the whole estate to a third person, Equity will not allow the assignee of the mortgage to do what the assignor could not have done, by interposing a dormant mortgage to the prejudice of an ignorant purchaser; to do that indirectly, by a secret assignment, which he could not do directly.⁴

6. In conformity with the principles stated in the last chapter, it is said, by Lord Mansfield, that where a debt is secured by mortgage, the assignment of the debt or forgiving it will draw the land after it, though the debt were forgiven only by parol; that whatever would give the money will carry the estate in the land along with it to every purpose, and that the estate in the land is the same thing as the money due upon it. Upon a similar principle, a simple contract debt has been held not to acquire the character of a specialty, in consequence of being secured by mortgage.⁵

7. These remarks, however, are to be considered as rather illustrative of the general qualities of a mortgagee's estate, than as literally true under all circumstances.* It seems to be only where the condition of a mortgage is performed strictly *at the time*, that the title will *ipso facto* revert in the mortgagor. If the debt be paid *after the day*, the mortgagee becomes a trustee in Equity, and may be compelled by a bill to reconvey; the necessity for which shows that the legal title is in him. So a term becomes absolute, and must be surrendered or assigned.

8. The mortgagor cannot have trespass against the mortgagee or any one holding under him, though the debt have been paid.⁶

9. In case of ancient mortgages, a reconveyance may be presumed.⁷

10. Upon the point, however, whether mere payment of the debt

¹ *Matthews v. Wallwyn*, 4 Ves. jr. 118.

² *Williams v. Sorrell*, 4 Ves. jr. 389. 6 John. Cha. 428.

³ *Id.* 427.

⁴ *James v. Johnson*, 6 John. Cha. 427.

⁵ 2 Burr. 978. See 1 Halst. 473.

⁶ *Howe v. Lewis*, 14 Pick. 329.

⁷ 2 Cruise, 86.

* See Judge Wilde's criticism upon them. (17 Mass. 404.)

will revest the estate in the mortgagor, there seems to be a conflict of the American authorities.¹

11. In Maine and Massachusetts, after payment of the mortgage debt, the mortgagee cannot maintain a writ of entry for the land, for the reason, that in such case he could not recover the *conditional judgment* provided by statute. But, on the other hand, the mortgagor cannot maintain this action against the mortgagee, the latter being in possession. His only remedy is by a bill in Equity.² These points will be further considered hereafter.

12. In New Hampshire and Maryland, a tender, even after condition broken revests the estate in the mortgagor. The statute, in New Hampshire, provides for a redemption, within one year after entry for condition broken, and that the mortgage shall become "utterly void." Nor is this construction controlled by other provisions, that the mortgagee shall release upon the record, and that money tendered shall be paid into Court; because these apply equally to a tender before breach of condition, and are designed merely to *perpetuate the evidence of payment* in favor of the mortgagor.³

13. In New York it is held, that, even in case of *chattels*, a tender after forfeiture will not revest the title in the mortgagor; but a tender and acceptance will. But an acceptance of a part of the debt will not have this effect.⁴

14. Chancery will decree satisfaction of a mortgage which has been paid, so that it may be cancelled on the record.⁵

15. In Massachusetts, Vermont, South Carolina, Indiana, Pennsylvania, Illinois, Rhode Island, Delaware, New Hampshire* and Alabama, statutory provision is made, for discharging mortgages upon the margin of the public record.⁶

16. In Pennsylvania, Illinois and Alabama, the mortgagee shall enter such discharge in three months from demand, under penalty of forfeiting a sum not exceeding the whole debt. In South Carolina, in three months from demand of any party interested in the estate, under penalty of one half the debt. In Rhode Island, Vermont and New Hampshire, in ten days from demand; in Massachusetts, seven days; in Delaware, sixty days; under penalty of paying all damage, or, in Delaware, a fixed sum, with treble costs in Rhode Island and Vermont. And the same provision is made, in the latter States, in case of a refusal to execute a release of the mortgage. The statute,

¹ Jackson v. Davis, 18 John. 7. — v. Bronson, 19, 325. 1 S. & R. 312. 1 Halst. 471. 2 Har. & M'Henry, 17.

² Wade v. Howard, 11 Pick. 297. Mass. S. J. C. Oct. T. Middlesex, 1836. 2 Har. & McH. 17. Vose v. Hardy, 2 Greenl. 322. 17 Mass. 419.

³ Swett v. Horn, 1 N. H. 332. 2 H. & McHen. 17.

⁴ Patchin v. Pierce, 12 Wend. 61.

⁵ Kellogg v. Wood, 4 Paige, 578.

⁶ Purd. Dig. 196. Mass. Rev. St. 408. 1 Verm. L. 194-5. Aik. Dig. 94. S. C. St. Dec. 1817, p. 26. Ind. Rev. L. 272. Illin. Rev. L. 510. R. I. L. 205-6. Del. Rev. L. 1829, 92.

* After payment or tender, the Court may decree a discharge, and a copy of the decree shall be recorded.

however, is not to impair the effect of any other legal discharge, payment, satisfaction or release, in Rhode Island.

17. In Indiana, the register of deeds may discharge a mortgage, on the exhibition of a certificate of payment or satisfaction, signed by the *mortgager* (qu. mortgagee?) or his representative, and attached to the mortgage, which shall be recorded. A similar provision in New York.¹

18. Where a mortgagor releases his equity of redemption to the mortgagee by warranty deed, made for full consideration, this is presumed to be a payment of the mortgage debt, unless there be clear proof to the contrary; and the presumption is strengthened by the lapse of more than six years from the purchase.²

19. Whether, by a purchase of the equity of redemption in a part of the land, the mortgage is not extinguished as to the whole, upon the principle that a contract cannot be apportioned, and in analogy with the well-settled rule as to a purchase of part of the land from which a rent-charge issues; has been suggested as a questionable point.³

20. It has been said, in Vermont, that a release of the equity of redemption to the mortgagee does not strengthen his legal title. But in South Carolina, although the mortgagor is expressly declared to be legal owner of the land, a release to the mortgagee will give him the whole estate.⁴

21. A formal release by the mortgagee of a part of the land from the mortgage does not discharge the rest of the land.⁵

22. The *depositing* of money with the mortgagee, accompanied with the note of a third person, upon payment of which the money is to be restored, does not constitute payment.

23. A mortgagor sold the land, receiving in payment the purchaser's note, and agreeing to extinguish the mortgage. He delivered the note to the mortgagee, with an agreement, that if paid, the proceeds should pay the mortgage; and he also left the sum due, with the agreement that it should not be *applied*, but merely to stop the interest. The mortgagee receipted for the money. The note was not paid. Held, these facts did not constitute a payment of the mortgage.⁶

24. The death of a mortgagee does not have the effect of turning the mortgage into payment of the debt, wholly or *pro tanto*. Hence, in New Hampshire and Connecticut, where a mortgagor dies insolvent, the course is to have the whole debt allowed by the commissioners of insolvency, and after receiving his dividend, the mortgagee shall hold the land for the balance. Nor will the fact, that the mortgagee has purchased the equity of redemption make any difference. But in

¹ 1 N. Y. Rev. St. 761. Ind. St. 1836, 64.

² Burnet v. Denniston, 5 John. Cha. 35. Ib. 214.

³ James v. Johnson, 6 John. Cha. 426.

⁴ Ellithorp v. Dewing, 1 Chip. 141. 1 Brev. 177. 3 M'Cord, 302.

⁵ Culp v. Fisher, 1 Watts, 494.

⁶ Howe v. Lewis, 14 Pick. 329.

Massachusetts the practice is, to allow the mortgagee only the excess of the debt over the value of the mortgage. This is in analogy with the English practice in cases of bankruptcy. And, in England, the mortgagee will be allowed to prove against the estate of the deceased mortgagor, only what remains due after a sale of the land.¹

25. Where a mortgagee recovers judgment upon the debt secured by the mortgage, and gives a receipt, acknowledging full satisfaction, upon the execution issued on such judgment; this is not conclusive evidence of a payment and discharge of the mortgage. Thus, where on the day previous to the giving of such receipt, the judgment-debtor conveyed his equity of redemption to a third person, who, on the same day the receipt was given, conveyed it to the mortgagee; held, the payment of the judgment must be construed only as an intended confirmation of the mortgagee's title; because the supposition of the payment of any money would involve the absurdity, that either the mortgagor or his assignee released all his interest, at the very moment when the money to redeem the land was paid to the person taking the release.²

26. Where money is paid by one person interested in an equity of redemption, to obtain a partial release of the mortgage, such payment shall be applied to the benefit of others interested in the equity, and not to independent claims held by the mortgagee.

27. A mortgaged to B two distinct parcels of land, and afterwards conveyed one of them to C and the other to D. B released to D, for a certain sum, the land transferred to him. C afterwards tendered to B a sum which, with the amount paid by D, was equal to the whole debt due; but B claimed the right to apply the sum paid by D to an independent debt, which he held against the mortgagor. Held, A might redeem the estate.³

28. A mortgage being given as security for a debt, and not merely for any particular evidence of debt, the general rule is, that nothing but actual payment of the debt will operate as a discharge of the mortgage. Thus, where the mortgage is given to secure a note, which is afterwards cancelled, and a new one substituted, the mortgage will stand as security for the new note.⁴ This decision was founded in part upon the principle, that the giving of a note is no payment of a prior debt.⁵

29. In Massachusetts, where a note is held to be *prima facie* payment of a debt, a new note, substituted for an old one which was secured by mortgage, though given to an assignee of the mortgage, will be subject to the same security, if not intended as payment; as be-

¹ *Amory v. Francis*, 16 Mass. 308. *Greenwood v. Taylor*, 1 Rus. & M. 186.

² *Perkins v. Pitts*, 11 Mass. 125.

³ *Hicks v. Bingham*, 11 Mass. 300.

⁴ *Elliot v. Sleeper*, 2 N. H. 525. 9 Mass. 247.

⁵ 2 N. H. 527.

tween the mortgagee and mortgagor, or parties claiming under them. Whether in relation to purchasers from the mortgagor, qu.¹

30. A mortgaged land to B, to secure *the amount* of a certain note, which he afterwards took up, and gave a new one. C purchased the land *bona fide* from A, who delivered to him the original note, which he had taken up. C brought a bill in Equity against B for a conveyance free from his mortgage; but the bill was dismissed.²

31. A mortgage to B. C, a creditor of A, afterwards summoned him in a trustee process against B, recovered judgment against A, and committed him upon execution, but afterwards released him. B brings ejectment upon the mortgage. Held, these facts constituted no defence to the action.³

32. Nor will the giving of new security for the mortgage debt operate to discharge the mortgage, though it be of a higher nature than the original security—as a *recognisance* for a simple contract.⁴

33. But, it seems, where a judgment has been recovered upon the debt, a release of the judgment will discharge the mortgage.⁵

34. It is a question of very frequent occurrence, whether, under the particular circumstances of a case, the transfer of a mortgage shall be construed as *an assignment*, by which the mortgage is preserved as a lien or incumbrance upon the land; or as a *discharge or extinguishment*, which relieves the land from incumbrance and lets in other and before posterior claims.

35. Upon the principle, that an equitable merges in the legal title, where both become vested in the same person; if the holder of an Equity of redemption pay and take an assignment of the mortgage, the latter is extinguished, unless he has some beneficial interest in keeping it alive. A Court of Equity will keep an incumbrance alive or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the party.⁶ A Court of Equity will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. With reference to the party himself, it is of no sort of use to have a charge on his own estate; and where this is the case, it will be held to sink, unless something shall have been done by him to keep it on foot. In the case of *an infant*, entitled to the estate and also to a charge upon it, the Court will keep the rights distinct, if it be deemed most beneficial for the infant. But Equity will not recognise as a beneficial purpose, the enabling a mortgagee, after he has purchased the Equity of redemption, at some future time to assign the mortgage, lying dead in his possession, to a creditor, instead of giving a new

¹ *Watkins v. Hill*, 8 Pick. 522.

² *Bolles v. Chauncey*, 8 Conn. 390.

³ *Davis v. Maynard*, 9 Mass. 247.

⁴ 11 Mass. 125.

⁵ *Cary v. Prentiss*, 7 Mass. 63.

⁶ 6 John. Cha. 395.

mortgage. On the contrary, this purpose is pregnant with fraud and imposition.¹

36. August 20, 1800, A mortgaged to B to secure payment of \$2500 in one year. In 1801, C, a creditor of A, caused his Equity of redemption to be sold on execution, and became himself the purchaser. In December, 1806, C paid and took an assignment of B's bond and mortgage, and in January, 1811, conveyed the whole estate to D for \$7500, with warranty against incumbrances, &c. In March, 1810, C assigned the bond and mortgage to E to secure \$3500. The assignment was *acknowledged* after the deed to D, and D in his answer (probably to a bill for foreclosure), stated his belief that it was *made* after the deed to him. Held, it was the intention of C to *extinguish* the mortgage, inasmuch as he could have no object in keeping it alive, and the bill was dismissed.²

37. On the other hand, when the transfer to the mortgagor is expressly designed to effect another object, it will not operate as an extinguishment.

38. A mortgaged to B and to C. D afterwards extended an execution upon the Equity of redemption. B and C entered into an agreement with A, that the land should be sold, and the proceeds applied, first to their mortgages, then to the execution of D. The land was sold accordingly to E, who paid the mortgage debts and the balance of the proceeds to D. D was privy to the arrangement. B acknowledged upon the records satisfaction of his mortgage, and C released to A all his right in the land. On the same day, A conveyed with warranty to E. Held, without reference to D's knowledge of the transaction, the effect of it was, to make E substantially the assignee of B and C, A being a mere instrument for effecting the assignment; and that D was not entitled to the land, without paying the mortgages to E.³

39. A, being a first mortgagee, made a lease of the land to B. C, a subsequent mortgagee, undertook to discharge the first mortgage, paid the debt, and took an assignment of the mortgage and lease, for the purpose of enabling him to collect the rent. Held, no extinguishment of the mortgage.⁴

40. But it has been held, that where a purchaser of the Equity of redemption takes an assignment of the debt for which the mortgage was given as security, the effect is the same as if the mortgagor himself had done it, and the debt is to be considered as paid.

41. A gives to B a note and mortgage, and then conveys the land to C. C pays B the amount due him, takes an assignment of the se-

¹ 18 Ves. jr. 384. 2 Ves. jr. 261. 6 John. Cha. 425.

² Gardner v. Astor, 3 John. Chan. 53.

³ Marsh v. Rice, 1 N. H. 167.

⁴ Willard v. Harvey, 5 N. H. 252.

curities, and then brings a suit against A, in the name of B, upon the note. Held, the action would not lie.¹

42. Where a prior incumbrancer contracts for a purchase of the land in discharge of his debt, and assumes the payment of a subsequent mortgage as a part of the consideration, such purchase will operate as an extinguishment of his mortgage, and give priority to the subsequent mortgagee.

43. A mortgaged to B, then to C, and then charged the land with another debt to B. A and C afterwards entered into an indenture, which set forth, that C had agreed for an absolute purchase of the land for a certain sum, being the amount of all the debts, out of which he was to pay a certain part to the *first mortgagee*, and retain the balance in satisfaction of his debt. In consideration of the sum named, being the amount of B's two claims, *the payment of which C assumed*, and of C's own debt, A conveyed the Equity of redemption, subject to the mortgage and charge of B, to C, and C covenanted to pay B. Held, C's debt was hereby extinguished, and that B might maintain a bill for foreclosure upon both his mortgages, without paying it.²

44. Another general principle on this subject has been thus stated. When he who has the right to redeem pays the mortgage money, the mortgage is discharged, because he becomes absolutely seised—he pays his own debt on his own account. The mortgage is extinguished, because the debt is paid *by the real debtor to the creditor*. But where one owns only *part of the land*, as he might pay the whole and call for contribution, so he may buy in the mortgage.³

45. If a mortgagor is appointed executor of the mortgagee, such appointment, and a subsequent conveyance of the land by the former, will operate as an extinguishment of the mortgage.

46. A mortgaged land to B, his father, as security for a bond. B died before condition broken, having appointed A his executor. A mortgaged the land to C, with the usual covenants of warranty, and C assigned the mortgage to D. Afterwards, A, as executor, assigned his own mortgage, given to B in his life-time, and the accompanying bond, to E; and E, in a suit upon the mortgage against A in his natural capacity, recovered possession of the land. D brings a suit for the land against E. Held, whether the mortgage given by A was extinguished by his appointment as executor or not, it was extinguished by his conveyance to C.⁴

47. A deed of quitclaim, given by the mortgagee to a purchaser of the Equity of redemption, in which he covenants only against the acts of those claiming under himself, may operate as an assignment of the mortgage.⁵

¹ Eaton v. George, 2 N. H. 300.

² Brown v. Stead, 5 Sim. 535.

³ Taylor v. Bassett, 3 N. H. 298.

⁴ Ritchie v. Williams, 11 Mass. 50.

⁵ Hunt v. Hunt, 14 Pick. 374. 15 Pick. 82.

48. It has been held in Massachusetts, that where a wife joined her husband in a mortgage, and a purchaser of the Equity of redemption from the administrator of the mortgagor, paid the sum due, and the mortgage was discharged upon the record; the widow was not thereby let in to her dower, the discharge having the effect to pass *the legal interest* to the holder of the Equity, and thus vesting the whole estate in him.¹

49. But this doctrine has been since overruled, and such discharge, made by the mortgagee to an execution purchaser of the Equity, held an extinguishment of the mortgage, which let in the widow to her dower.²

50. The purchaser of an Equity of redemption at an execution sale, who afterwards takes an assignment of the mortgage, may recover possession of the land by a suit commenced before the expiration of the year within which the mortgagor has a right to redeem, although neither such purchaser nor the mortgagee ever entered on the land. Held, there was no merger of the mortgage.³

51. A and B, tenants in common, mortgaged to C and D to secure \$400. Afterwards, their Equity of redemption was sold to E, upon an execution in favor of another creditor. C and D recovered a judgment for possession of the land; and afterwards C conveyed all his interest in the land to E, and E conveyed one half of the right in Equity of A and B, which he had purchased at the execution sale, to F. Subsequently, the execution in the suit of C and D was served by delivering possession of the land to the parties entitled. Afterwards, E conveyed to D all his interest in the land, thereby uniting in D the titles of mortgagor and mortgagee of half the land. This conveyance F treated as payment of one half of the debt; and, having tendered the amount of the other half, he brought a bill in Equity against D to redeem. Held, as D purchased only a moiety of the Equity of redemption, only a moiety of the mortgage could be held as extinguished; that the recovery of a judgment upon the mortgage by C and D, being previous to D's acquiring any interest in the Equity; was no indication of his intentions as to an extinguishment or otherwise; and that, as there was nothing to show that D would in any way gain by keeping alive a moiety of the mortgage, it should be held extinguished.⁴

52. Where a mortgagor executes a release of the equity of redemption to the mortgagee, and receives from him the note secured; this does not extinguish the mortgagee's title under the mortgage, or his right to recover damages for breach of the covenants of warranty contained therein. The fact that the mortgage deed contains such cove-

¹ Popkin v. Bumstead, 8 Mass. 491.

² Eaton v. Simonds, 14 Pick. 96.

³ Freeman v. Paul, 3 Greenl. 260.

⁴ Tuttle v. Brown, 14 Pick. 514.

nants, while the deed of release does not, constitutes a sufficient ground for keeping the mortgage alive.¹

53. It is the general rule, that a Court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor. But, as the legal title is not technically released by receiving the money, this rule must be founded on an equitable control by courts of law over parties in ejectment; and is therefore subject to exceptions, where equity so demands.

54. Land was sold by trustees, for payment of the debts of one deceased. The land was mortgaged by him before his death, and the mortgagee brings ejectment upon the mortgage, against the trustees and the heirs of the mortgagor. The purchaser had received no deed from the trustees, and therefore gained no legal title, but he had paid most of the purchase money. The mortgagee having obtained a decree for foreclosure and sale, the purchaser, with the consent and in presence of one of the trustees, paid the whole amount due upon the mortgage; the sum being considered as part of the purchase money, due under the sale made by the trustees. The mortgagee gave the purchaser a receipt, and an order to enter the suit "settled," which was done. In an action of ejectment by the heirs of the mortgagor against the purchaser, held, although a stranger could not set up a mortgage, satisfied by the mortgagor, to defeat his title; yet he might thus use a mortgage bought in by himself; that, in this case, the purchaser owning the equitable estate, and having paid off the mortgage on his own account, the incumbrance belonged to him, and the *mortgagor* could not have demanded a reconveyance from the mortgagee; and that the action would not lie.²

55. Where a third person purchases mortgaged property, nominally as from the mortgagor, but really from the mortgagee, or with his concurrence and by his request; the latter will not be allowed to set up a title under his mortgage.

56. A mortgages to B, to secure the purchase money of property bought from B. Afterwards, A being unable to pay the purchase money, application was made to C, with the knowledge and by the desire of B, who himself wrote to C on the subject, to buy a portion of the property at an advanced price from B. C accordingly bought it, and paid the price; but the receipts were expressed to be on account of A's debt to B. Before the purchase was completed, B expressed to C his perfect confidence in his fulfilling his engagements. Most of the property was delivered to C with B's consent, and a part of it by B himself. The portion remaining in B's hands having been sold at a reduced price, and his debt against A being therefore un-

¹ Lockwood v. Sturdevant, 6 Conn. 374. (Baldwin v. Norton, 2 Conn. 161. Marshall v. Wood, 5 Verm. 250.* 15 Pick. 453.)

² Peltz v. Clarke, 5 Pet. 481.

* The marginal note states that the release of the equity was by a *warrantee* deed; but the case does not so find.

satisfied; B claimed to hold the part conveyed to C, under his mortgage from A. C files a bill for a perpetual injunction against this claim. Held, B was a party to the contract between A and C, and the portion of the property sold to C was discharged from the mortgage.¹

57. Where a release of a mortgage is made to distinct parties, it will take effect according to their respective interests in the land, independent of such mortgage.

58. A mortgaged land to B. Afterwards, A and B joined in mortgaging to C. C entered for condition broken, but, before the three years requisite for foreclosure had elapsed, according to a previous agreement, tendered a release of his mortgage, which they refused to receive, until five years had passed from C's entry. Held, the release reinstated A and B in their former relation of mortgagor and mortgagee, as if the mortgage to C had never been made.²

CHAPTER XXXIV.

MORTGAGE—PAYMENT OF, FROM WHAT FUND.

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|---|---|
| <ol style="list-style-type: none"> 1. Debt paid from the fund benefitted—
 executor and heir. 2. Mortgage by father and son. 3. Devised lands. 6. Personal estate may be expressly ex-
 empted. 7. Exceptions to the rule of applying the
 personal estate. | <ol style="list-style-type: none"> 8. Rule in New York. 9. In Pennsylvania. 10. Purchaser of personal estate not
 liable. 11. Recapitulation of cases. 41. Application of payments in Equity. |
|---|---|

1. It is a rule in Equity, that where a person dies, leaving a variety of funds, one of which must be charged with a debt; it shall be paid out of that fund which received the benefit. Hence the personal estate, in the hands of the executor, shall be applied to discharge a mortgage upon the real estate in the hands of the heir; because the money borrowed went to increase the personal estate. And it is immaterial, whether there is any personal obligation for payment of the money or not, because there was a debt contracted by the borrowing.³

¹ *Skirving v. Neufville*, 2 Des. 194.

² *2 Cruise*, 146-7.

³ *Baylies v. Bunsey*, 5 Greenl. 153.

2. If a father and son join in a mortgage of the father's land, without covenant, the father receiving the money, and the son conveying for a nominal consideration; the real assets of the father will not be charged in the hands of the son, an heir not being bound even by an express obligation, unless specially named; nor the real or personal assets of the son, who had received no part of the money borrowed.¹

3. The principle above stated requires the discharge of a mortgage, upon lands devised as well as those descended, out of the personal estate of the testator.²

4. The personal estate is liable to the payment of a mortgage debt, though the land is devised *subject to the incumbrance*, or the personal estate bequeathed, or the land expressly charged with payment of debts, or the real estate limited in trust, either in fee or for a term, for payment of debts. The principle upon which this rule is founded will be particularly considered hereafter.³

5. If the personal estate is deficient, a mortgage shall be discharged from the proceeds of land devised for payment of debts.⁴ Where a mortgaged estate is devised, and another estate descends to the heir, the latter shall be applied in payment of the mortgage.⁵ This point was settled by Lord Hardwicke, upon reconsideration of a decree to the contrary, in regard to which he remarked, that "not to confess an error, is much worse than to err."⁶

6. A testator may, however, exempt the personal estate from payment of the mortgage debt, by substituting the real estate in its stead. And this may be done, either by express words, or by a manifest intent appearing upon the will. So, the specific bequest of a chattel will exempt it from liability for a mortgage debt.⁷

7. The rule above stated, being founded on the consideration, that the debt was originally a personal one, and the charge on the land merely collateral, is not applicable, where the mortgage debt was contracted by one person, and the land descends to another.⁸ Thus, if a grandfather mortgage, with a covenant to pay the money, and the land descend to his son, who dies without paying the mortgage, leaving personal estate and a son, the father's personal estate shall not be applied in payment of the mortgage. So, a covenant by one person to pay the debt of another, which is secured by mortgage, will not subject the personal estate of the former, primarily, to the payment of the debt. And even though a person expressly charge his real and personal estate with his debts, this will not render the personal estate liable to the payment of a mortgage made by another. Upon the same principle, where one purchases an Equity of redemption, his

¹ 2 Cruise, 146-7.

⁴ Ibid. 149.

⁶ Ibid. 152-60. 2 Atk. 424.

⁸ Ibid. 163.

^{*} See Descent, Assets.

² Ibid. 147.

³ Ibid. 152.

⁷ Ibid. 161-2.

⁵ Ibid. 148.

personal estate will not be applied to payment of the mortgage money, even though he have expressly covenanted to pay it, unless it appears to have been his intention to make the debt his own. If a wife joins her husband in a mortgage of her own estate, and the money goes to his benefit, his personal estate will be first applied in payment of it. But where money is borrowed on the wife's estate, partly to pay her debts, and partly for the husband's use, the latter is not bound to indemnify the wife's estate against any part of it. And if it appear not to have been the wife's intention to stand as a creditor for the mortgage money, the husband's personal estate will not be liable.¹

8. In New York, the heir or devisee of a mortgaged estate shall not call upon the executor to redeem it, unless the will expressly so direct.*

9. A mortgaged to the plaintiff one lot of land, and then devised all his estate, comprising many other lots, to B. B died, having devised the mortgaged tract to C, and the rest of her estate to her executors. The plaintiff having recovered judgment upon the bond which accompanied the mortgage, a motion was made that the sum due should be levied upon the land mortgaged, and the rest of the estate discharged. Held, that all the lands which had belonged to A should contribute, according to their respective values; that there was nothing in the will of B showing an intention that C should take the estate *cum onere*, and therefore it should share equally with the other lands in payment of the mortgage debt; and that to charge C with the whole debt, she being a specific devisee, would plainly defeat the intention of B, while to charge the lands held by the residuary legatees would not have that effect.²

10. As between heir and executor, the rules above stated are of little consequence in the United States. As between devisee and executor, they may be important; but very few cases have been decided. There is, however, one decision of extraordinary ability and value.

11. The English doctrine and cases upon this subject are thus presented by Chancellor Kent, in his opinion in the case of *Cumberland v. Codrington*.³

12. As between the representatives of the real and personal estate of the deceased purchaser of a mortgage, the land is the primary fund to pay off the mortgage.

13. In *Shafto v. Shafto*, (2 P. Wms. 664, n. 1) decided by Lord Thurlow in 1786, the devisee of land, mortgaged by the testator, covenanted with the holder of the mortgage, that the estate should remain as security for the debt and interest, with an additional one per cent.

¹ 2 Cruise, 164-5-6-8-70-73-5.

² 1 N. Y. Rev. St. 749.

³ *Morris v. McConnaughy*, 2 Dall. 189.

⁴ 3 John. Cha. 252.

* In Missouri, the Court may order redemption with the personal assets, if the will makes no provision therefor, and it will be beneficial to the estate and not injurious to creditors. Otherwise, the Court may order a sale of the equity. *Misso. St. 51.*

of interest. The question was, whether the personal estate of the devisee, who had died in the mean time, should not pay the debt and interest, or at least the arrears of interest, with the additional one per cent. Held, the land was the primary fund to discharge the mortgage, that the interest must follow the nature of the principal, and that the contract for additional interest was also in the nature of a real charge.

14. In *Tankerville v. Fawcet* (2 Bro. 57), Lord Kenyon declared, that where an estate descends or comes to one, subject to a mortgage, although the mortgage be afterwards assigned, and the party covenants to pay the money, his personal estate will not be bound. The devisee of land, having voluntarily charged a simple contract debt of the testator upon the land devised, and died; held, the debt was not the proper debt of the devisee, and his personal estate was not liable.

15. In *Tweddell v. Tweddell*, (2 Bro. 101, 152), A purchased the equity of redemption of a mortgaged estate, and agreed with the mortgagor to pay, in part consideration of the purchase, the mortgage debt, to the son and heir of the mortgagee, and the rest of the purchase money to the mortgagor. He also covenanted with the mortgagor, that he would thus pay the mortgage debt, and indemnify the mortgagor from the mortgage. A died, having devised the estate. Upon a bill by the devisee, to have the mortgage discharged from the personal estate, held, the personal estate was not thus liable; that the personal estate is never charged in Equity, where it is not at law; that A took the land subject to the charge, but the debt, as to him, was a real, not a personal one; and that his contract with the mortgagor was a mere contract of indemnity, which would have been implied, if not expressly made.

16. In *Billinghurst v. Walker*, (2 Bro. 604), an estate was held by a lease for lives, subject to a charge of £2,200 to A. It was conveyed by the holder to B, subject to this charge, and to a charge of £900 to C; and B, in the indenture of conveyance to which A was party, covenanted to pay both charges. B paid the debt to C, and afterwards gave bond to pay A the interest of her claim for her life, and the principal at his death. The lease having been repeatedly renewed, B died, having devised the estate to two of the defendants, and appointed two others of the defendants his executors. The charge being called in, and paid to a legatee of A, by the executors of B, the defendants were called on by the plaintiffs, pecuniary legatees of B, who were unpaid, to have the £2,200 replaced by the devisees of the land, and paid over to them. Held, notwithstanding the covenant by B to pay the debt, contained in an instrument to which A, the holder of the debt, was a party, and the subsequent bond, altering and extending the original time of payment; the nature of the charge was not varied, but it remained primarily a debt upon the land; that though B incurred a personal liability to the creditor, this did not subject his personal estate, because such intention did not appear; and the defendants were decreed to pay over the money.

17. Hence, it seems, to charge the personal estate, the assumption of the debt must be accompanied with evidence of an intention to assume it, as a *personal* debt, detached, as it were, from the land.¹

18. In *Mattheson v. Hardwicke* (2 P. Wms. 664, n.), the testator devised land to A and B in fee, charged with the payment of debts and legacies. A paid all of them but one legacy, for which he gave his note, and died. It was admitted, that he had paid off the other incumbrances, in order to relieve the land from them entirely. Held, the note was merely collateral security, and the land the primary fund for payment of the legacy.

19. The question, in the latter cases, seems to be, not whether the party, acquiring the mortgaged or charged estate, has made himself personally liable for the debt, but whether the land or the personal estate shall be treated as the primary fund for payment. The distinction is this; that where one mortgages land as security for his own debt, the debt is the principal, and the mortgage merely collateral. But, on the other hand, where one acquires an estate already mortgaged, even though he personally assume the debt, and covenant to pay it, he is understood to become a debtor only in respect to the land, and his promise to be made on account of the land, which therefore is the primary fund for payment. The cases establishing each of these propositions are said to be equally numerous and decisive.²

20. In *Woods v. Huntingford* (3 Ves. 128), A had mortgaged land to raise money for his son, B. The land was afterwards conveyed, subject to the mortgage, to the use of B, who joined with his father in a covenant for payment of the money. The land was next reconveyed to A, who covenanted to discharge the mortgage, and afterwards borrowed a further sum from the mortgagee, and made a new mortgage for the whole debt. The question was between the heir and personal representative of A, which should pay the debt. Lord Alvanley, M. R. held, that though the debt belonged primarily to B in Equity, and to A and B together at law, A had made it his own; and that it was as strong a case as could exist, without express declaration. He was careful not to contradict in any degree the principle established in *Tweddell v. Tweddell*, which was a very governing case. In that case, there was no communication with the mortgagee, but only a covenant of indemnity; and the purchaser did not thereby personally assume the debt.³

21. In *Butler v. Butler* (5 Ves. 534), the purchaser of an equity of redemption agreed with the vendor, to pay the mortgage debt of £2,000, and also £1,000 to the vendor; but there was no communication with the mortgagee. The authority of *Tweddell v. Tweddell* was recognised, as showing that the land was primarily chargeable with the debt, which did not become the debt of the purchaser, as a

¹ 3 John. Cha. 256.

² *Ib.* 256-7.

³ 3 John. Cha. 258.

personal liability. Lord Alvanley collected from the decisions, that the purchaser of land, charged with a debt, by a mere covenant to indemnify the vendor; does not make the debt his own, *except in respect to the estate*; and the estate, not his personal property, must bear it. The purchaser might be circuitously liable to the vendor for his indemnity, but the decree would have been, in such case, for a sale of the land.¹

22. In *Waring v. Ward*, (5 Ves. 670; 7, 332), the testator, having purchased a mortgaged estate, borrowed a further sum, and gave a new bond and mortgage for it. Held, the debt should be paid from the personal estate, because the personal contract was primary, and the real contract only secondary. Lord Eldon, in giving judgment, remarked, that in general the personal estate was primarily liable, because the contract was primarily a personal contract, and the land bound only *in aid* of the personal obligation. That Lord Thurlow carried the doctrine so far as to hold, that if the purchaser of an equity of redemption covenants to pay the mortgage debt, and also to raise the interest from four to five per cent.; yet, as between his real and personal representatives, even the additional interest is not primarily a charge upon the personal estate, being incident to the charge. That, even without any express covenant, the purchaser of an equity is bound to indemnify the vendor against any personal obligation, and pay a debt charged upon the land. That the case of *Tweddell v. Tweddell* proceeded upon the ground, that the debt due the mortgagee was never a debt *directly* from the purchaser. That if Lord Thurlow was right upon the fact, the case was a clear authority, that the purchase of an equity will not make the mortgage debt the debt of the purchaser. That in his hands it is the debt of *the estate*, and a mortgage interest, as between his representatives.

23. In the *Earl of Oxford v. Lady Rodney* (14 Ves. 417), the testator purchased a mortgaged estate, paid the consideration remaining for the vendor beyond the mortgage, and then covenanted with the mortgagee to pay him the mortgage debt. After his death, upon the question whether the personal estate should go to pay the debt, Sir William Grant, M. R. remarked, that it was not very easy to reconcile the case of *Tweddell v. Tweddell*, with the decision in *Parsons v. Freeman*, by Lord Hardwicke, that where the mortgage money is taken as part of the price, the charge becomes a debt from the purchaser. But he admits that Lord Thurlow's principle was right, in a case where the contract of the purchaser gives to the mortgagee no *direct and immediate* right against himself, but is a mere contract of indemnity.

24. Chancellor Kent remarks upon these observations,² that the mortgage debt is always *part of the price*, unless the vendor agrees to

¹ 3 John. Cha. 268.

² Ib. 260-1.

remove the incumbrance. By covenanting to indemnify the vendor, the purchaser takes the land *cum onere*, and the value of the incumbrance is of course deducted from the value of the land. This was the fact in many of the cases already cited.

25. From this series of cases, Chancellor Kent deduces the general principle,¹ that a covenant by the purchaser of an equity of redemption, to indemnify the vendor against the mortgage, does not make the debt his own, so as to render it primarily chargeable upon his personal assets. To produce this effect, there must be a *direct* communication and contract with the mortgagee, and moreover some decided evidence of an intention to charge primarily the personal estate; as where the original contract is essentially changed, and lost or merged in the new and distinct engagement with the mortgagee; and the party shows that he meant to take upon himself the debt, absolutely and at all events, as a personal debt of his own.

26. Chancellor Kent then proceeds to a consideration of the older cases upon this subject, and concludes that they establish the same doctrine.²

27. In *Pockley v. Pockley*, (1 Vern. 36), the testator had purchased an annuity out of mortgaged lands, and taken an assignment of the mortgage to protect his purchase. By his will, he directed that the mortgage debt should be paid from his personal estate. Lord Chancellor Nottingham decreed, that it should be thus paid, in consequence of this express direction.

28. Chancellor Kent remarks,³ that this case shows, that the purchase of land mortgaged did not at that day make the debt a personal one, but an express direction by will was required to have this effect. This view is confirmed by the observation of the counsel in the case, that the purchaser of an equity of redemption must hold the land subject to the debt, but was not personally liable, as for his own proper debt.

29. In *Coventry v. Coventry* (9 Mod. 12; 2 P. Wms. 222; Str. 596), A had a life estate, with power to settle a jointure upon his wife. He covenanted to settle lands accordingly, but died before doing it. The plaintiffs brought a bill against the heir for a specific execution. Held, the assets of A should not be applied to relieve the settled estate, because, wherever assets were thus applied, the debt originally charged the personality. The covenant remained as a real lien on the settled estate, and the personal estate could not be applied, since there was no debt from which this estate was to be relieved.

30. In *Bagot v. Oughton*, (1 P. Wms. 347), the ancestor mortgaged his estate and died. His daughter and heir married, and the husband settled the estate by fine on himself and his wife; joined in

¹ 3 John. Cha. 261-2.

² Ibid. 263-4.

³ Ibid. 264.

an assignment of the mortgage, and covenanted to pay the money, and died. Lord Chancellor Cowper held, that the mortgage was not to be paid from the personal estate of the husband, the covenant being only an additional security to the lender, and not designed to change the nature of the debt.

31. In *Evelyn v. Evelyn* (2 P. Wms. 659), A mortgaged his land, and his son B afterwards covenanted with an assignee of the mortgage to pay the debt. Upon the death of A, B came to the estate by settlement, and died intestate. Held, B's personal estate should not be applied to the debt, for it was still A's debt, and B's covenant was merely a surety for the land.

32. In *Ancaster v. Mayer* (1 Bro. 454), Lord Thurlow was inclined to think, that, in the preceding case, B, by his covenant, had assumed the debt; and he supposed the idea of the Court, was, that the covenant was by way of accommodating the charge, and not of making the debt his own. But Ch. Kent considers the decision as conformable to those in other cases.¹

33. In *Leman v. Newnham* (1 Ves. 57), the same point was settled, where a son, inheriting a mortgaged estate, covenanted with the mortgagee to pay the debt.

34. In *Parsons v. Freeman* (Ambl. 115, 2 P. Wms. 664 n.), Lord Hardwicke remarked, that where an ancestor has not charged himself personally with a mortgage debt, the heir shall take *cum onere*. So, if one purchase the equity of redemption, with usual covenants to pay the mortgage, he knew of no decision to that effect, but was inclined to think, the heir could not claim to have the land relieved. But where, as in that case, the purchaser agreed with the vendor to pay a part of the price to him, and the rest to the mortgagee, this made the debt his own, and the personal estate should be first applied to pay it.

35. Chancellor Kent supposes,² that this case is imperfectly reported, no facts being given, and a very brief note of the opinion. He remarks that, as it stands, it is repugnant to most of the cases which preceded and followed it; and that Lord Hardwicke himself soon afterwards made a contrary decision. Thus, in *Lewis v. Nangle* (Amb. 150, 2 P. Wms. 664 n.), a mortgaged estate came to a married woman. The husband borrowed money by bond and mortgage of the land, the wife joining, and the money being applied partly for his use, and partly to pay her debts. The husband gave a bond, and covenanted to pay the whole mortgage debt. Lord Hardwicke held, according to the presumed intention of the parties, that the land was still the primary fund for payment, and that the husband was not bound to relieve it.

36. In *Forester v. Leigh* (Amb. 171, 2 P. Wms. 664 n.), a tes-

¹ 3 John. Cha. 266.

² Ib. 266-7.

tator purchased several mortgaged estates, and covenanted to pay the debt due upon one of them. He purchased only a part of another of the estates, and he and his co-purchaser covenanted to pay their several shares and to indemnify each other. Held, by Lord Hardwicke, as between legatees and devisees of the testator, the debts should be paid from the land.

37. In the case of the *Earl of Belvedere v. Rochfort* (6 Bro. Parl. 520), A mortgaged to B, and afterwards sold to C. In the covenant of warranty in the latter deed, the mortgage was excepted, and the deed stated, that the mortgage debt was to be paid by C out of the purchase money. An endorsement also acknowledged payment of a part of the price *on perfection of the deed*, and the rest *allowed on account of the mortgage*. C, by his will, gave a large personal estate to his wife, and also devised to her the mortgaged land for life, then to his oldest son George in fee, subject to debts and legacies, declaring that his wife should hold free from incumbrance, and that George should pay the interest of the mortgage debt from other lands devised to him. After some legacies, he bequeathed the rest of his personal estate, after payment of all his just debts, and all his real estate, to George, whom he appointed his executor. George paid the interest but not the principal of the mortgage debt. His mother also released her interest in the land to him. He made a will, giving small annuities to his younger sons; the mortgaged land, according to his estate therein, to his youngest son William; and the principal part of his estate, being very large, to his eldest son Robert. After the death of George, Robert refused to pay the principal or interest of the mortgage debt, and, William being unable to pay it, the mortgage was sold, and afterwards the estate also, under a decree. William then filed a bill against the executors of the father (of whom Robert was one) and of the grandfather, to have the mortgage debt paid from the personal assets, in relief of the land. Lord Chancellor Lifford decreed, that the mortgage debt was the debt of the grandfather at his death; and that his personal estate, which came first to the son and afterwards to the grandson, should be applied to pay the mortgage debt. The decree was affirmed in the House of Lords.

38. Chancellor Kent¹ questions the authority of this case as a precedent, although a different decision would have operated with extreme hardship under the circumstances. "But hard cases often make bad precedents." He remarks, that it has been disregarded or rejected by Lord Thurlow, Lord Alvanley, Lord Eldon, and Sir William Grant; and also that no precise account is given of the reasons upon which the decision was founded, and it may perhaps be considered as turning upon the construction of a will and its very special provisions.

¹ 3 John. Cha. 270-1-2.

39. The result of the cases, as stated by Chancellor Kent, is,¹ that as to wills, the testator may charge an incumbrance upon his personal assets, by express directions, or by disposition, and language equivalent to such directions—as where a charge upon the land would oppose or defeat other provisions in the will. And, in order to charge the personal assets by acts done in his life-time, he must become directly liable to the creditor, and also indicate in some way an intention to make the debt his own.

40. Although an heir is entitled to the aid of the personal property of the mortgagor in paying off mortgages, yet, if he disposes of the mortgaged estate, he cannot afterwards come upon the personal estate for assistance. And there seems to be no authority, requiring an administrator to redeem mortgaged estates in foreign countries; inasmuch as he would have no power to do any act as administrator in those countries.²

41. Where a creditor, holding several debts, some of which are secured by mortgage and others not, joins them in one suit, and recovers judgment, and the execution is satisfied only in part; a Court of Equity will first apply the monies received, to extinguish those parts of the claim which are not secured by the mortgage. Whenever the mortgage is enforced in a suit for foreclosure, upon the hearing in Equity to ascertain the amount due, every consideration, as to the application of payments and partial satisfaction, will arise, which could be entertained in the ordinary course of a bill in Equity. The case is one, not of voluntary payment, but of a satisfaction *pro tanto in invitum*, and the plaintiff may well be presumed to make the application, in the manner most beneficial to himself.³

42. Bill in Equity, brought by A against B and C, to foreclose a mortgage, made by B to A, January 1, 1817, to secure a note for \$1,116. C was a purchaser of B's right of redemption. C filed a cross bill, in which he alleged, that the mortgaged premises consisted of two distinct parcels of land, one of which was of much greater value than the other; that lot No. 1, being the less valuable parcel, had been sold to him in November, 1821, upon an execution against B and himself, as B's security, for \$175; and he prayed that the mortgage debt, due to A, might be apportioned upon No. 1 and No. 2, according to their respective value, and the former discharged from the mortgage upon payment of the amount thus charged upon it; or that A might be decreed to accept his debt from C, and assign the mortgage to him. It appeared that in July, 1821, B sold No. 2, the purchaser having received a verbal promise from A to release his claim to it under the mortgage. In February, 1822, after C's purchase of

¹ 3 John. Cha. 272.

² Haven v. Foster, 9 Pick. 133-4. See 10 Pick. 77. 1 Lit. 318.

³ Williams v. Reed, 3 Mas. 423-4. See 2 Greenl. 341.

No. 1, A, without consideration, accordingly made a release. Held, this was not a case, where C, as a party interested in one of two mortgaged estates, might, by the aid of Equity, throw the burden upon the other, because A's interests would be thereby injured; but that C was entitled to relief, either by paying A his debt, and taking a conveyance of all the property still incumbered by the mortgage; or by paying such proportion of the debt, as the value of C's purchase bore to that of all the estate holden in security; that the Court were bound to regard the *equitable* situation of the property at the time of C's purchase, taking into view A's parol obligation to release a part of it, as any other course would be punishing him for the benevolent act of relinquishing a part of his security; and that C, not being a mere speculator or volunteer, but having purchased in consequence of his being bail for B, was entitled to the privilege, which A would otherwise have had, of electing between the two modes of relief above named.¹

CHAPTER XXXV.

SALE OF EQUITIES OF REDEMPTION ON EXECUTION—EFFECT THEREOF.

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| 1. Estate of mortgagor—universally liable to execution.
2-3. Effect of sale—mortgagor's right after sale.
7. Levy upon two executions.
8. Levy in case of disseisin.
9. No ouster of mortgagee.
10. Purchaser becomes seised. | 12. Attachment of equity—mortgage discharged before sale.
15-18-19. Redemption from purchaser—when, and on what terms.
16. Fraudulent mortgage; sale of equity void.
18. Right to redeem subsequent mortgages. |
|--|---|

1. THE right of a mortgagor to redeem his estate is almost universally liable, in the United States, to be taken upon execution by his creditors.* This liability seems to be a necessary incident or consequence of the principle, already considered at length, that the mortgagor, until foreclosure, and as to third persons, remains the *owner of the land*, while the mortgagee has a mere *lien*, which is not subject to legal process. The provisions of law in the several States, relating to the seizure and sale of equities of redemption upon execution, will be par-

¹ Chittenden v. Barney, 1 Verm. 28.

* In New Hampshire, equities of redemption have always been held liable to execution, and the Statute of July 3, 1822, merely has the effect to change the mode of levy from an extent to a sale. Pritchard v. Brown, 4 N. H. 402. So in Maryland, Kentucky, North Carolina and New York. 1 Gaines, 47. 1 Ky. Rev. L. 653. 9 Cranch, 456. 1 N. C. Rev. St. 266. Whether in Indiana, *qu.* 1 Black. 153.

ticularly stated hereafter.* A few general principles on the subject are stated in this chapter.

2. In Massachusetts, by Statute 1782, c. 57, an equity of redemption might be *set off*, as land subject to incumbrance, to the judgment creditor, and the debtor might redeem the right in equity by paying the debt. By a later Statute, 1798, c. 77, a right in equity might be *sold*, and the proceeds applied to payment of the debt; and the debtor was allowed three years to redeem. The provisions of the *Revised Statutes* upon the subject will be stated hereafter.† The former statutory rules are stated by the Court,¹ as above mentioned; and I give them here, not as being now in force, but merely as introductory to other observations of the Court in the same case, which seem to be of permanent applicability, and probably are adopted, in substance, in all the States.

3. Where an equity of redemption is taken on execution, the whole estate of the debtor is taken from him. A mortgagor is considered as the *owner* against all but the mortgagee. But a debtor, after such levy, has not, strictly speaking, any estate or interest in the land. He is not a freeholder. He has only a *possibility*, or right to an estate, on payment of a certain sum of money. The law presumes that he has received the full value of his estate; and the right of redemption still reserved to him, is a mere personal privilege to keep his own land, if he does not wish to part with it at its full value. He is under no obligation to redeem. There is no reciprocity between him and the creditor. The creditor cannot demand the money, but is merely bound to convey the land on receiving payment in a certain time.²

4. Upon these grounds, the right in question is not liable to be again taken upon execution.‡ The Legislature might have made it thus liable; but they have not done so, probably because it was considered of no value. *Real estate mortgaged* is made subject to execution; because land is usually mortgaged for less than its value, and the right of redemption, therefore, a valuable interest.³

5. Nor can it be said that the debtor, after such sale, still owns his former right of redemption, but subject to a new lien by the purchaser. This is not the language of the statutes. His whole estate is taken from him. His remaining right is like a right of *pre-emption*, as if the purchaser had covenanted to convey to him at a certain price, paid in a certain time.⁴

6. A made a mortgage of certain land. August 8, 1811, his equity of redemption was sold on an execution to B. Afterwards, on the same day, another deputy sheriff undertook to sell the same right, upon another execution, to C, and gave him a deed of it. August 13,

¹ Kelly v. Beers, 12 Mass. 388-9.

² Ibid.

³ See *Execution, Title by—Attachment*.

⁴ But if mortgaged anew, the new equity of redemption may be taken. 5 Pick. 281.

² Kelly v. Beers, 12 Mass. 389-90.

⁴ Ibid.

† Mass. Rev. S. 470.

the same right was sold and conveyed upon a third execution to D. D brings a real action for the land against A. Held, no title had vested in D.¹

7. But where the same equity of redemption is simultaneously attached by two creditors, both executions may be levied upon it, and each creditor will be entitled to a moiety of the proceeds, without reference to the relative amount of the debts. They hold, not in shares or proportion, but *per mie et per tout*. But as the attachment constitutes merely a lien in security of a debt, if the moiety which either can hold is more than sufficient to satisfy his debt, the surplus will go to the other.²

8. It has been held, that a right in equity to redeem, being a mere incorporeal hereditament, will pass by a sale on execution, though the land have been long in the possession of a disseisor.³ In an earlier case, however, or a previous hearing of the same case, it was remarked, that an execution purchaser might maintain a real action for the land against a stranger, unless the latter had disseised the mortgagor before the sale.⁴ The true principle upon this subject, and one which seems to reconcile the apparent contradiction between the former cases, has been settled in a case long subsequent to both of them.⁵ It is here held, that if the mortgagor is seised at the time of the sale on execution, the sheriff's deed conveys to the purchaser the mortgagor's *actual seisin*, precisely as a deed by the mortgagor himself would have done; but if the mortgagor is not seised, then the sheriff's deed passes not a seisin, but a *right of entry*. In the latter case, it seems, the deed of the sheriff is not invalid, on account of an adverse possession by a stranger;⁶ because, if this were the case, creditors would have no power to take an equity of redemption for their debts, where the mortgagor is disseised. The entry of the sheriff could not purge the disseisin, no entry being necessary to a sale. The judgment creditor could not enter, having no right before the levy; and the purchaser has no interest till after the sale. The mortgagor could not be expected to enter, for the purpose of having the land taken from him by execution. Hence the sheriff's deed must pass a *seisin in law*. The purchaser may enter, and then bring a writ of entry upon his own seisin; or, perhaps, before entry, he might bring an action, founded upon the seisin of the mortgagor, to whose rights he has succeeded.

9. The sale on execution of a right in equity to redeem, will not operate as an *ouster* of the mortgagee, who has previously entered under his mortgage. Such sale is effectual in passing to the purchaser all the right of the mortgagor; and an entry for the purpose of seising

¹ Kelly v. Beers, 12 Mass. 387.

² Sigourney v. Eaton, 14 Pick. 414.

³ Wellington v. Gale, 13 Mass. 483.

⁴ Wellington v. Gale, 7 Mass. 139.

⁵ Poignard v. Smith, 6 Pick. 172. (See s. 10-11).

⁶ See Mass. Rev. St. 463.

and levying upon such right is no trespass. It is consistent with the rights of the mortgagee. But, for any subsequent entry, the mortgagee may maintain trespass against the purchaser, without a re-entry.¹

10. The Statute of 1798, c. 76, provided, that the sheriff's deed of a right in equity should pass the title, in the same manner as a deed executed by the debtor himself. Hence such purchaser becomes seised, except as against the mortgagee, and may maintain an action for the land, without actual entry.²

11. So, where the purchaser of an Equity, sold upon execution, had tendered to the holder of the mortgage the amount due upon it; held, he had acquired a seisin sufficient to sustain an action for the land against the mortgagor.³

12. The form, in which executions are to be levied in the several States upon equities of redemption, will be particularly stated in another part of this work. Equities being subject to *attachment* as well as execution, in those States where this method of securing debts is adopted, the question has arisen, how an execution is to be levied, where a mortgage is discharged after attachment and before sale.

13. A mortgaged to B, Dec. 15, 1806, to secure \$500; and, April 29, 1807, mortgaged the same land to B, to secure \$300. July 18, 1807, A conveyed the land to C, subject to the mortgages to A. July 23, 1807, C mortgaged the land to B, to secure the sums of \$1500 and \$837. July 24, 1807, B discharged A's mortgages, acknowledging full satisfaction. The sums secured by A's mortgages, made a part of those secured by C's mortgage. May 18, 1807, D, a creditor of A, caused A's estate in the land mortgaged to be attached in a suit against him; and, in December 1807, levied his execution upon A's equity of redemption, which was sold by the officer to E. Neither D nor the officer knew the fact that B had discharged the mortgages made to him by A. E brings an action against B to recover the land. Held, that if at the time of the sale on execution, there was no subsisting incumbrance except the mortgage by C, which arose after the attachment, then the levy was void, being made in the form prescribed in relation to equities of redemption; and if B's mortgage was still in force, then the purchaser's proper remedy was by a bill in equity to redeem. B either still continued the mortgagee, notwithstanding the discharge, or the assignee of C, for whose benefit the mortgages were still to be considered as in force. And E could not be held to gain an equitable title by his purchase, and at the same time treat the mortgages as extinguished without any expense to him. Upon the possible supposition, that the mortgage had been redeemed by A, E could make no title except upon the

¹ *Shepard v. Pratt*, 15 Pick. 32.

² *Willington v. Gale*, 7 Mass. 138.

³ *Porter v. Millet*, 9 Mass. 101. (See s. 8).

ground that the incumbrances still subsisted for A's benefit, and to secure to him the money paid for E's use. E came in the right of A, and could not claim against the mortgages to B, who, if E had any title, was a mortgagee in possession, or the assignee of a subsisting mortgage, originally made to himself; and, as to E, claiming under mortgages not redeemed or discharged, and subject to which his title was acquired. As a general rule, it may perhaps be said, that the purchaser of an equity of redemption can aver no seisin or title against any other person than the execution debtor, or his immediate tenants or assigns. Hence, though E might recover against C, he could not recover against B, having no legal seisin or title, till B's mortgage was redeemed.¹

14. In this case, it is laid down, that the mode of levying the execution upon the interest of a mortgagor, is to be determined by the situation of his estate at the time of *attachment*; and if at that time the mortgage was extinguished, though before the levy a new mortgage was made, a levy as upon an equity of redemption is void. From this decision, it would seem to be a necessary inference, that the converse of the proposition must also be true; and that, if the land is subject to mortgage at the time of attachment, but the mortgage extinguished before the sale, the levy cannot be made by metes and bounds, as upon a legal estate, but only by the sale of an equity of redemption. But a contrary doctrine seems to be advanced in a very late case. It is said, that the attachment merely fixes a *lien* on the premises, without transferring the title or affecting the nature of the estate. The mode of levy, the act by which a title is to be transferred, it would seem, must be determined by the nature of the debtor's title at the time of the levy, and not at the time of the attachment. The equity of redemption is in fact gone, and it would seem to be absurd to pursue a mode solely applicable to a subsisting equitable estate, when such estate no longer exists. These remarks are made without reference to any statutory provision, but the Court consider the case as provided for by an express statute.²

15. The lien, created by the attachment of an equity of redemption, may extend beyond the amount of the judgment recovered in the suit, and cover the whole amount for which the equity is sold upon execution. Thus, where the mortgagor, after such attachment, conveys his right in equity to a third person, and the equity is afterwards sold on execution, for a much larger sum than the amount of the execution; the surplus belonging to the mortgagor, not to the purchaser, the latter cannot redeem, without paying the whole purchase money paid to the sheriff.³

¹ Forster v. Mellen, 10 Mass. 421.

² Freeman v. McGaw, 15 Pick. 83-4. (See Mass. Rev. St. 550).

³ Gilbert v. Merrill, 8 Greenl. 295.

16. A mortgage, made to defraud creditors, is as to them void, and creates no equity of redemption, liable to be taken on execution.

17. A mortgaged land to defraud his creditors. B, one of his creditors, attached A's equity of redemption. Pending this attachment, C, another creditor, extended an execution upon the land, treating it as unincumbered property. Afterwards, A's equity of redemption was sold on execution, and in completion of the attachment, to an innocent purchaser, D. In an action to recover the land by C against D, held, the sheriff's sale was void, no equity of redemption having been created by the mortgage, and that C had a good title to the land. If D had claimed by a direct purchase from A himself, he would have taken the land free of incumbrance, as an innocent purchaser. But, claiming by a *statute title*, he was bound to prove every thing necessary to constitute such title. In authorizing the sale of an equity of redemption, the Legislature contemplate the existence of a *valid* mortgage. Moreover, a creditor may levy upon the land of his debtor, and thereby acquire *as good title as the latter had therein*; and, *in regard to his creditors*, a fraudulent grantor has a perfect title. Nor can one creditor, by attaching an equity of redemption, and thereby recognising the mortgage as valid, deprive others of the right to treat it as void, by seising the land itself.¹

18. The right of redeeming subsequent mortgages may be taken in execution.

19. The creditor of a mortgagor having attached an equity of redemption, the debtor made another mortgage, after which all his interest in the land was attached by another creditor. The equity first attached was then sold on execution, which was satisfied by a part of the proceeds; and, before the officer had paid over the surplus, the execution of the second creditor was delivered to him. Held, the surplus belonged to the second mortgagee; and that the second creditor might levy on the right of redeeming the second mortgage.²

20. In Massachusetts, if the mortgagor does not within a year redeem his equity of redemption, sold on execution, his whole interest is lost, and he cannot redeem the mortgage, though the purchaser does not redeem.³

21. Where rights in Equity, of redeeming distinct parcels of land from several mortgages, are sold upon one execution, they ought to be sold separately, and not for a gross sum; for the debtor has a right to redeem one without redeeming others. But a third person cannot object to a joint sale.⁴

¹ Bullard v. Hinkley, 6 Greenl. 289. (See p. 328).

² Clark v. Austin 2 Pick. 528.

³ Ingersoll v. Sawyer, 2 Pick. 276.

⁴ Fletcher v. Stone, 3 Pick. 250.

CHAPTER XXXVI.

MORTGAGE, WHEN VOID OR VOIDABLE.

2. Usury.
11. Infancy.

13. Eviction.
14. Fraud.

1. In many respects, a mortgage is not distinguishable, with reference to the circumstances which render it void or voidable, from an absolute deed. The extensive title of *Deed* will be considered hereafter; and therefore the subject will be very briefly noticed in the present connexion.

2. It has been held, in the Supreme Court of the United States, that, upon a bill for foreclosure, the mortgage may be declared void for *usury*.¹

3. The doctrine laid down in New York is, that if a lender seeks to enforce his securities in Equity, usury is a defence, and, if made out, the Court will order that the securities be delivered up and cancelled. But where a mortgage contains a *power of sale*, under which the mortgagee is proceeding to foreclose, without the aid of a Court of Equity, and the borrower files a bill for relief, he will be held to pay so much as is lawfully due, before relief will be granted.² A vendee under such power will acquire a good title, though the mortgage is usurious.³ The purchaser has the better equity. But if the mortgagee himself purchase through an agent, the mortgagor may recover the land.⁴

4. It has been doubted by high authority, whether the purchaser of an equity of redemption can object, that the mortgage was made upon usurious consideration, or, as a plaintiff, can have any relief in Equity, without offering to pay the amount due.⁵

5. Where a mortgage is assigned for the amount due upon it, and the mortgagor agrees to repay the assignee a sum exceeding this amount and legal interest; he cannot avoid the mortgage upon this ground, but will be required to pay only the lawful sum due.⁶

6. A mortgage, made upon usurious consideration, is void only as against the mortgagor, and those lawfully holding under him.⁷

¹ De Butts v. Bacon, 6 Cranch, 252.

² Fanning v. Dunham, 5 John. Cha. 122.

³ Sternberg v. Dominick, 14 John. 435.

⁴ Bush v. Livingston, 2 Caines' Cas. in E. 60.

⁷ Green v. Kemp, 13 Mass. 515; 15, 103.

⁵ Jackson v. Henry, 10 John. 185.

⁶ Gordon v. Hobart, 2 Sumn. 401.

7. If judgment has been recovered upon a usurious contract secured by mortgage, and a new mortgage given, the mortgagor cannot resist a suit on the latter, upon the ground of usury.¹

8. So where a mortgagee sues upon the mortgage, and the mortgagor defends upon the ground of usury, but fails, and afterwards conveys his right in the land; the assignee cannot maintain ejectment against the mortgagee upon this ground, being estopped by the former judgment.²

9. It is said, that after foreclosure by entry and continued possession, the mortgagee has a perfect title to the land, though the mortgage debt was usurious.³

10. In Pennsylvania, a usurious contract is not absolutely void. Hence a mortgagee, in such case, may recover the amount loaned, with legal interest.⁴

11. The mortgage of *an infant* is *voidable* only, not void. Hence, where an infant mortgaged his land, and, after coming of age, made a deed of the land recognising and subject to the mortgage; the latter deed was held to be a confirmation of the former one, and the mortgagee recovered judgment against the second grantee.⁵

12. So where A conveyed land to B, an infant, at the same time taking back a mortgage for the purchase money; and B occupied after coming of age, and conveyed with warranty to C; held both the occupancy and the conveyance amounted to a confirmation of the mortgage.⁶

13. To an action of ejectment by a mortgagee against the mortgagor, it is a good defence, that the latter has been *evicted* from the land by a paramount title; notwithstanding he has become a purchaser under such title, and continues to occupy the land.⁷

14. It will be seen hereafter, that all deeds made to defraud creditors are void.* There is no difference, in this respect, between mortgages and absolute deeds. But a distinction has been taken, with respect to this ground of avoiding a mortgage, between a suit at law and a bill in Equity.

15. In Connecticut,⁸ upon a bill for foreclosure, it is held that the *title* of the mortgagee cannot be inquired into. Hence, where, after production of the note and mortgage, certain attaching creditors of the mortgagor set up as a defence to such bill, that the mortgage was fraudulent and void against creditors; it was held that such evidence was inadmissible. The Court remarked, that if the title to land *might* be brought in question in this process, then it must be local; whereas,

¹ Thacher v. Gammon, 13 Mass. 268.

² Adams v. Barnes, 17 Mass. 365.

³ Flint v. Sheldon, 13 Mass. 450.

⁴ Turner v. Calvert, 12 Ser. & R. 46. 2 Dall. 92.

⁵ President, &c. v. Chamberlin, 15 Mass. 220.

⁶ Hubbard v. Cummings, 1 Greenl. 11.

⁷ Jackson v. Marsh, 5 Wend. 44.

⁸ Palmer v. Mead, 7 Conn. 149.

* See Fraudulent Conveyance, and *supra* p. 326.

by the established law, a bill for foreclosure need not be brought in the county where the land lies. In such bill, it is sufficient to aver, that the defendant executed a *deed on condition*; and of course any circumstances, showing the instrument to be *no deed*—such as forgery, want of witnesses, duress, fraud, coverture, &c.—may be shown in defence; but not circumstances merely impairing its effect. (Two Justices dissented.)

16. Where one mortgages land, to defeat the dower of his wife, and without consideration, the mortgage is void as to the widow and as to his creditors, but valid against himself and his administrator. A Court of Chancery, in such case, will enjoin the mortgagee from proceeding to a judgment and sale of the whole mortgaged premises, but will suffer him to sell, subject to the widow's dower. And, in Pennsylvania, where a sale on mortgage defeats the right of dower, the Court, upon a *scire facias* by the mortgagee against the administrator to foreclose, will let in the widow to defend; and, if there is a real debt, there shall be a verdict and judgment, giving to the mortgagee a lien on the whole interest as to the real debt, and for the whole amount subject to the widow's thirds; or, if the mortgage was fraudulently given, without consideration, and for the purpose of defeating the wife, a verdict and judgment for the plaintiff, subject to the widow's dower. But the same principle does not apply to the provision made for the widow in that State by the intestate acts, in lieu of dower. This is a *contingent* right, with none of the common law privileges of dower, and subject to be defeated by the husband's acts. Therefore, in the case supposed, the mortgage cannot be *wholly* avoided, merely upon the ground that the widow *might*, in case the intestate died without kindred, have been entitled to the whole estate.¹

17. Upon a bill to redeem, brought by a subsequent, against a prior mortgagee, the latter cannot defend, upon the ground that the second mortgage is fraudulent as against creditors; but, as showing the intention of certain acts, and in connexion with a want of delivery of the deed, the evidence is admissible.²

18. Another species of fraud, which will avoid a mortgage, as *against third persons*, is a misrepresentation or concealment, on the part of the mortgagee, with respect to his incumbrance upon the land, whereby other parties are induced to purchase or advance money upon it, supposing the title to be clear. This kind of fraud is chiefly cognisable in Equity, though even Courts of Law will often take notice of it. In many cases, Equity and law have concurrent jurisdiction. The principle of Equity is, that where one seeks by misrepresentation or even improper concealment of facts, in the course of a transaction, to mislead the judgment of another to his prejudice, the Court will

¹ Killinger v. Reidenhaner, 6 Ser. & R. 531.

² Powers v. Russell, 13 Pick. 69.

generally interfere. Mere concealment or *looking on* has the same effect, as using express words of inducement. But, in general, it must appear, that the acts would not have been done, and that the party must have conceived they would not have been done, except upon such encouragement; though, in some cases, even the ignorance of the party misleading has been held to make no difference. In a case of this kind, Chancery will not only refuse its aid to enforce the mortgage, but, upon a bill by the party injured, to *quiet his title*, will decree a perpetual injunction against enforcing the mortgage, declare it void, or order a release or reconveyance.¹

19. A, having a mortgage of a leasehold estate, the mortgagor, B, borrowed the original lease of him, with the intention of obtaining another loan upon the land. Held, if A was privy to B's intention of taking up more money, A's mortgage should be postponed.²

20. The purchaser of mortgaged land, who had no notice of the mortgage, brings a bill in Equity against the mortgagee, charging that the mortgagee *fraudulently* stood by, and witnessed the making of valuable improvements by the purchaser, and did not disclose his lien, or intimate that he had any interest in the property. Held, the charge of fraud required *an answer*, and a *demurrer* to the bill was overruled.³

21. A held a mortgage upon certain land. B, proposing to take another mortgage, consulted with A, who informed him that his (A's) mortgage was satisfied, and that B might safely take a mortgage. Held, neither A nor his assignee with notice could set up the prior mortgage against B.⁴

22. Where a mortgage was given, on the eve of bankruptcy, for a very old debt, the circumstances were deemed so suspicious that the Court would not interfere for sale, upon the mortgagee's petition.⁵

¹ Jeremy on Eq. Juris. 385-7-8. 1 Story on Eq. 375-7, and seq. (See Briggs v. French, 1 Sumn. 504. Bettes v. Dana, 2 Ib. 383. Foster v. Briggs, 3 Mass. 313. Barnard v. Pope, 14, 437. Spear v. Hubbard, 4 Pick. 143. Stone v. Lincoln, Middlesex Oct. T. 1836. Evans v. Bicknell, 6 Ves. 182. Storrs v. Barker, 6 John. Cha. 166. Wendell v. Van Rensselaer, 1 Ib. 344. Lee v. Munroe, 7 Cranch, 368. 2 John. R. 573. Hobbs v. Norton, 1 Vern. 136. 2 Ib. 725).

² Peter v. Russell, 2 Vern. 726.

⁴ Lasselie v. Barnett, 1 Black. 153.

³ Cater v. Longworth, 4 Ohio, 385.

⁵ Dewdney, 2 Mont. and Ayr. 72.

CHAPTER XXXVII.

MORTGAGE—REMEDIES OF MORTGAGEE AND MORTGAGOR AT LAW.

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| 1. Distinction between mortgage and trust as to remedy. | 9. Title of mortgagee under a third person, no payment. |
| 2. Action at law by mortgagor, after payment. | 11. No action at law by mortgagee in New York and South Carolina. |
| 4. Action at law by mortgagee, after payment. | 13. Tender in Court by mortgagor. |
| 5. Remedies in New Jersey. | 14. Suit by execution purchaser. |
| 6. Form of judgment for mortgagee. | 15. Assumpsit by mortgagor. |
| 8. Possession under a judgment, no payment. | 16. Remedy by <i>scire facias</i> , &c. |
| | 21. Commitment of mortgagor. |

1. It has already been remarked (p. 283), that a mortgagee is often called a *trustee* for the mortgagor; that in some respects he is such, while, in others, the relation which he sustains is very different from that of a trust. One striking point of difference may be properly noticed here. A mortgagee may enforce his right by adverse suit, *in invitum*, against the mortgagor—which can never take place between trustee and cestui que trust. They have always an identity and unity of interest, and are never opposed in contest to each other. In general, a trustee is not allowed to deprive his cestui que trust of the possession; but a Court of Equity never interferes to prevent the mortgagee from assuming possession, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and cestui. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely, for his own use and benefit. A trustee is stopped in Equity from dispossessing his cestui, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. So the mortgagee is not prevented but assisted in Equity, when he proceeds, not only to obtain possession, but an absolute title by foreclosure.¹

2. Some remarks have already been made (pp. 202–3) upon the point, whether payment of the mortgage-debt, after condition broken, *ipso facto*, revests the estate in the mortgagor.* With this question is of course connected the further inquiry, what is the proper remedy for a

¹ 2 Story on Eq. 278, n. 3. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 182 to 189, &c.

* See 1 Mar. 53, 3 H. & Mc. Hen. 399, that it does, in Kentucky and Maryland; and 2 Day, 151, contra, in Connecticut.

mortgagor, after such payment, to regain possession of the land. If, by payment, the legal estate is revested in him, he is of course entitled to maintain an action at law upon his legal title; but if otherwise, his only remedy is a bill in Equity.

3. In Massachusetts, it was early held, that the only remedy of the mortgagor in the case supposed, is a bill in Equity. And this doctrine has been adhered to in subsequent cases. It is placed upon the grounds, that the statute law provides for the discharge of a mortgage, after payment, upon the record, thereby implying that the legal estate remains in the mortgagee; and chiefly, that the bill in Equity is an adequate and convenient remedy, and well adapted to the doing of impartial justice to all parties; on the one hand, moderating the rigor of the common law for the benefit of the mortgagor, and on the other compelling him to do justice to the mortgagee. It is as beneficial to the mortgagor as a suit at law, and may sometimes be more so; for, if the evidence of payment be doubtful, the mortgagee may be compelled to answer under oath to the fact. It is certainly more beneficial to the mortgagee. If the mortgagor brought ejectment, the mortgagee could obtain no allowance for repairs; which depends either upon the statute, or the rules of Equity. It is unknown to the common law, which considers the mortgagee as absolute owner.¹

4. In the case from which these remarks are taken, the Court proceeded to notice the objection, that, upon this principle, the mortgagee, after payment, might recover the land from the mortgagor, thereby working manifest injustice; and *the fact*, that he might so recover it, seemed to be admitted. But in a late case, it is said, that this admission was inadvertently made; and distinctly decided, that if the mortgagor, after condition broken, have paid the debt, the mortgagee cannot recover possession of the land, because *the conditional judgment*, provided by statute, which authorizes a writ of possession, unless the defendant within a certain time pay the debt, &c. cannot; in such case, consistently be rendered.²

5. In New Jersey, it is said, a bond, and a mortgage given to secure it, are to be considered, for some purposes, as separate obligations for the same debt. The creditor in enforcing payment may consider them as distinct. He may proceed singly upon the obligation; or he may proceed singly upon the mortgage, either by ejectment to recover possession, or by bill in Chancery to foreclose; or he may proceed upon both securities at the same time. If the mortgagee proceeds by ejectment, he will recover possession of the land, and retain it only till the debt is paid. He gains no title, but is a trustee for the mortgagor, being accountable for the rents and profits. If he proceed simply to sue on his bond, the execution may be levied indiscrimi-

¹ *Hill v. Payson*, 3 Mass. 560. *Parsons v. Welles*, 17 Mass. 419.

² *Wade v. Howard*, 11 Pick. 297.

nately on all the defendant's property, whether included in the mortgage or not. If the mortgaged premises are sold, the estate conveyed by the sheriff to the purchaser, is in no manner affected by the circumstance, that a mortgage had been previously given. The mortgagee may be considered as party to the proceedings, and it would be questionable, at least, whether, having treated the property as the estate of the mortgagor, he should not be estopped from ever after setting up a claim under the mortgage. This is the general understanding of the country ; the purchaser bids as if there were no mortgage ; all parties are considered as joining in the sale, and, in case of any deficiency, the estate is considered as discharged of the claim.¹

6. A statute in Massachusetts provides, that, in suits upon mortgages after condition broken, the Court shall render judgment for the plaintiff, to recover so much as is due according to Equity and good conscience.

7. A and B, tenants in common, mortgaged to C, to secure a joint and several bond. Afterwards, A mortgaged an undivided half of the farm to D. D assigned the latter mortgage to C, who took possession of the land thereupon for condition broken. C then brings a writ of entry against B, for an undivided half of the land, upon the first mortgage. Held, if the suit had been brought for the whole land against both A and B, B might have redeemed, by paying the whole debt, and would then have stood in Equity as assignee of the mortgage, not only as against B, to compel contribution, but as against any subsequent mortgagee—otherwise, by means of a second mortgage from A, B might be deprived of all security ; and that, instead of compelling B to adopt this course, and afterwards bring an action or bill against C, claiming under the second mortgage, to enforce his rights under the first, more especially as C had entered to foreclose for a debt voluntarily created after the first mortgage ; the Court would exercise its equitable powers in this suit, and render judgment only for the amount equitably due in relation to the land, which was *one moiety* of the debt, a moiety of the land having been taken by C to secure another debt from A alone. Judgment for possession, unless the defendant within two months pay half the money due on the bond. Such judgment would be no bar to a suit against B, upon the bond, for the balance due, because the facts on which the judgment was founded were specially set forth. If A had been a mere surety for B, the whole amount being *equitably* due from B, a different rule would be adopted.²

8. Entry and possession under a judgment upon mortgage, cannot be construed a payment of the mortgage debt. The whole is but a *process to compel* payment, and is only equivalent to an entry to fore-

¹ *Harrison v. Eldridge*, 2 Halst. 408-9.

² *Sargent v. McFarland*, 8 Pick. 500.

close without a judgment. To consider it payment, would be to compel the mortgagee to become a purchaser, when he might choose to hold the land as security. But, after foreclosure, the estate may be valued, and he may be deemed to have received payment *pro tanto*.¹

9. Where a second mortgagee takes a conveyance of the land, from another person holding a first and a third mortgage, after the latter has entered and foreclosed the latter mortgages; to a suit by the second mortgagee upon his note, it is no defence, that the land, and the rents and profits thereof, are of greater value than the aggregate of the amounts secured by all the mortgages; because the plaintiff has acquired an absolute title to the land, wholly independent of his own mortgage.²

10. In Massachusetts, Maine, New Hampshire and Rhode Island,³ in all real actions upon mortgage, after condition broken, the judgment shall or may be a conditional one, that if the mortgagor, &c. pay to the mortgagee, &c. the sum adjudged due within two months, no writ of possession shall issue—otherwise such writ shall issue. In Massachusetts, such judgment must be moved for by one of the parties;⁴ and cannot be claimed by a defendant who is not the mortgagor, nor one claiming under him. In Vermont,⁵ judgment, in such case, is rendered in common form, but the Court, on application of the defendant, stay execution; and order that, if he pay the amount due in a time not exceeding one year, the judgment shall be vacated. Payment is to be made to the clerk, who shall give a certificate thereof, to be recorded, and also take a receipt from the plaintiff.

11. In New York, the action of ejectment cannot be brought upon a mortgage.⁶

12. In South Carolina,⁷ mortgagees are expressly prohibited from bringing any possessory action for the land; the mortgagor being deemed owner of the land, even after condition broken, and the mortgagee owner of the debt. Upon the recovery of judgment on the personal security, the judges of the Court may order a sale of the land, giving, if they see fit, a reasonable extension of time, not exceeding six months; and allowing a credit of not more than twelve months. This proceeding is to operate as a perfect foreclosure. But, at any time before sale, the mortgagor may prevent it, and entitle himself to an entry of satisfaction on the mortgage, by paying the debt and costs.

13. In New Jersey, where a mortgagee brings a suit either upon the mortgage or the bond secured thereby, if no suit in Equity is pending at the time, and if the defendant bring into Court the amount of debt and costs, the Court will discharge him from the mortgage,

¹ *West v. Chamberlin*, 8 Pick. 336. *Hedge v. Holmes*, 10 Pick. 381. (See p. 341).

² *Hedge v. Holmes*, 10 Pick. 380.

³ *Mass. Rev. St.* 634. 1 *Smith's St.* 163-4. *N. H. L.* 63. *R. I. L.* 210.

⁴ 1 *Verm. L.* 84.

⁵ 2 *N. Y. Rev. St.* 312.

⁶ 1 *Brev. Dig.* 174-5.

⁷ In Rhode Island, by the defendant.

and order a reconveyance of the premises, and a delivery to the mortgagor of all evidences of title.¹

14. Where lands have been sold on execution, and the purchaser brings ejectment against the judgment debtor, the defendant cannot set up in defence an outstanding mortgage given by himself, before the judgment lien attached to the land.²

15. In New Hampshire, it has been held, that a mortgagor cannot have assumpsit against the mortgagee for the profits of the land, received by the latter, between the time of entry to foreclose, and the time when the land was redeemed.³

16. In Pennsylvania, after twelve months from the day of payment of the debt, or performance of the condition, named in the mortgage, a *scire facias* may be issued against the mortgagor, and, upon execution issued thereon, the land may be sold as upon other executions, or, for want of purchasers, delivered to the mortgagee, not subject to redemption.⁴ If the mortgagee have released a part of the land, he may proceed against the remainder, but the mortgagor may plead, that the sum claimed is greater than ought proportionably to be charged upon the land.⁵ No sale or delivery of the mortgaged premises shall give any further term or estate in the land, than the land is mortgaged for.⁶ A sale upon a mortgage shall not affect the prior lien of any other mortgagee. (The latter provision is made by an act passed April 6, 1830. It had been previously held, that a sale on execution discharged all liens, prior and subsequent.⁷)

17. In Delaware, a mortgagee may have a writ of *scire facias*, after twelve months from breach of condition. The land is sold, as upon other executions. But the sale passes only the interest owned by the mortgagee.⁸

18. In Illinois, the same remedy by *scire facias* may be had upon a mortgage. If the debt is payable by instalments, the last must be due. The land is sold, as upon execution.⁹

19. In Indiana, (Ind. Rev. L. 244, s. 25) the mortgagee files a bill according to the course of the common law, upon which the Court may render an equitable decree, and may order a sale of the land at auction. The statute provides, that the purchaser shall take the land free from incumbrances, and not subject to redemption, and that, in all sales on execution, the surplus proceeds shall be paid over to the debtor; but it further provides (p. 245) that no sale of property on execution, by virtue of sect. 25, shall create any further term or estate in vendees, mortgagees or creditors, to whom it is sold or delivered, than the estate was mortgaged for.

¹ 1 N. J. Rev. C. 162. Den v. Spinning, 1 Halst. 471.

² Lessee, &c. v. Butler, 2 Ohio, 225.

³ Robinson v. Robinson, 1 N. H. 161.

⁴ Purd. Dig. 194.

⁵ Ib. 204.

⁶ Ib. 292.

⁷ Ib. 297.

⁸ Del. St. 1829, 305-6-7.

⁹ Illin. Rev. L. 376.

20. In Ohio, for the purpose of foreclosure, the land is appraised as for sale upon execution, and, if two thirds of the valuation exceed the debt and interest, sold at auction, and the surplus proceeds paid over to the mortgagor; if not, the absolute title is transferred to the mortgagee, with no right of redemption. In the latter case, he may still recover the balance of his debt.¹

21. It has been held in England, that, after a mortgagee has proceeded to commitment of the mortgagor in a suit upon the debt, he may still have a remedy upon the mortgage.²

CHAPTER XXXVIII.

MORTGAGE—REMEDIES IN EQUITY—FORECLOSURE AND REDEMPTION.

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| <ul style="list-style-type: none"> 1-12. Lapse of time. 2. General principles of foreclosure. 6-24. Massachusetts. 9-30. Maine. 11. Rhode Island. 14. New York. 16. Connecticut. 17. Georgia. 18. New Jersey. 19. New Hampshire. 21. North Carolina. | <ul style="list-style-type: none"> 22. Ohio. 31. Foreclosure—whether payment of debt, &c. 40. Right of redemption may be revived. 44. Mortgage cancelled by mistake. 46. Equity will not relieve, where there is a legal right. 47. Fraud. 48. Payment into Court. 49. Mortgagor cannot redeem on payment by a third person. |
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1. It has been already stated (p. 290) that a mortgagor may be barred of his right of redemption by lapse of time, and undisturbed possession of the land by the mortgagee. In addition to this general limitation, the law has provided more specific modes of barring or foreclosing an equity of redemption.

2. Chancellor Kent says, a mortgagor's right of redemption may be barred or foreclosed by the mortgagee after giving due notice to redeem. The ancient practice was, by bill in Chancery to procure a decree for strict foreclosure, which had the effect of giving an absolute title to the mortgagee. This still continues to be the usual English practice; though, in some cases, the mortgagee obtains a decree for a

¹ Walk. 303. 1 Ohio R. 286; 3, 187.

² Davis v. Battine, 2 Russ. & M. 76.

sale of the land, under the direction of an officer of the Court, in which case the proceeds are applied to the discharge of incumbrances according to priority. The latter practice is adopted in New York, Maryland, Virginia, South Carolina, Tennessee, Kentucky and Indiana.¹

3. It is said, "if a freehold estate be held by way of mortgage for a debt, it may be laid down as an invariable rule, that (in order to a sale) the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance, where the creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open a door to the most shameful imposition and abuse."²*

4. Where the practice prevails, of foreclosure without sale, its severity is mitigated by enlarging the time of redemption from six months to six months, or for shorter periods, according to the equity arising from circumstances.³

5. In Massachusetts, the mortgagee, after condition broken, may recover possession by action, or may enter openly and peaceably, if not opposed by the occupant; and a continued peaceable possession for three years will foreclose the mortgage.

6. If made without a judgment, a memorandum or certificate of the entry is made upon the deed, and signed by the mortgagor or party claiming under him, and recorded; or else a certificate of two competent witnesses to prove the entry, is made and sworn to, and recorded; and no entry is effectual for foreclosure, unless a certificate or a deposition in proof thereof is thus made and recorded.⁴

7. In case of entry before condition broken, the three years, limited for redemption, will not begin to run till breach of condition, and written notice, that the possession is thenceforth to be held for condition broken or for foreclosure; unless the mortgagee make a new entry or commence an action. The same certificate or deposition, to prove such notice or new entry, shall be made and recorded, as above provided in case of other entries.⁵

8. A mortgagee, pending an action upon the mortgage, entered upon the land *in pais* for condition broken, and afterwards entered under a judgment in the suit. Held, the latter entry was a waiver of the former, and the three years for foreclosure dated from the latter.⁶

9. In Maine, an entry to foreclose shall be made by process of law, by the written consent of the mortgagor, &c., or by the mortgagee's taking open and peaceable possession before two witnesses.⁷

¹ 4 Kent, 180-1.

² 4 Kent, 181-2.

³ Mass. Rev. St. 634.

⁴ Fay v. Valentine, 5 Pick. 418.

⁵ 1 Smith's St. 161-2.

⁶ An express power to sell is an exception to the rule.

⁷ Per Ch. Kent, Hart v. Ten Eyck, 2 John. Cha. 100.

⁸ Ib. 635-6.

10. Where a mortgagee, in Maine, took possession of the land, under an execution, in presence of his own agent and the sheriff only, held, they were not the *two witnesses* required by law.¹

11. In Rhode Island, three years' possession is sufficient to foreclose a mortgage. Possession is to be taken, either by legal process, or by peaceable and open entry in presence of two witnesses, who shall give a certificate of the fact. The party giving possession shall acknowledge it to be voluntarily done before a magistrate, and both the certificate and acknowledgment shall be recorded. The Court are empowered to hear in Equity all bills of foreclosure, brought after the mortgagee has taken possession, by consent of parties, without legal process.²

12. In this State, the general doctrine of foreclosure by *lapse of time*, independently of statutory provisions, has also been recognised. Thus, where a mortgagee had been in visible possession of the land for ten years, nine of them after condition broken, and, four years after the death of the mortgagor, conveyed to one having no actual notice of the mortgage, and affected by it only so far as it varied constructively from the registry; and the purchaser occupied eighteen years and made valuable improvements; and the mortgagor's estate, being insolvent, was administered by the mortgagee; held, the right of redemption, as against the purchaser, must be deemed to have been abandoned by all parties interested, and a bill for that purpose, brought by a devisee of one of the mortgagor's heirs, was dismissed.³

13. But where a part of several parcels of land, mortgaged by one deed, have been conveyed by the mortgagee to a bona fide purchaser, against whom the right of redemption is barred by lapse of time; the mortgagor may still redeem such portions of the land as remain in the mortgagee's possession.⁴

14. In New York, upon a bill for foreclosure or satisfaction, the Court may decree a sale of the whole or a part of the land. When a bill is filed for satisfaction, the Court may not only compel a delivery of the land to a purchaser, but, on the return of the report of sale, may decree payment of any balance remaining due, and recoverable by law, either by the mortgagor or a surety, if the latter be joined in the bill; and issue executions, as in other cases. During and after such process, no suit at law shall be brought for the debt, unless authorized by Chancery. The bill must set forth, whether any proceedings have been had at law upon the debt; and, if judgment has been recovered, the bill will be dismissed, unless the sheriff has returned on execution, that the debtor has no property except the mortgaged premises. Sales shall be made, and deeds given, by a Master, and shall vest the same title in the purchaser, that a foreclosure

¹ 1 Gordon v. Hobart, 2 Sumn. 401.

² Dexter v. Arnold, 1 Sumn. 109.

³ R. I. L. 210-1.

⁴ Ibid.

would have vested in the mortgagee, and shall be as valid as if executed by both mortgagor and mortgagee. The surplus proceeds shall be brought into Court for the use of the defendant or other party entitled, and, if not taken out in three months, invested for their benefit. If the bill is filed for the payment of an instalment or of interest, it shall be dismissed, upon the defendant's paying the amount due, with costs, before the decree for a sale. If paid afterwards, proceedings shall be stayed, but a decree of foreclosure and sale entered, to be enforced upon any subsequent default, on a new petition, and by a further order. In such case, the Court will ascertain, through a Master, whether a portion of the land may be sold, sufficient to pay what is due, and decree accordingly. If a sale of the whole will be most beneficial, such sale will be decreed, and the whole debt paid, deducting interest on the portion not due, if not payable on interest; or the Court may order such portion to be put out at interest for the benefit of the parties.¹

15. By a late statute, land sold under mortgage, or a decree thereon, may be redeemed in one year. So any distinctly sold portion of the whole. Ten per cent. interest shall be paid. A tender may be made either to the officer or the purchaser, who shall give a certificate of the payment; or, in case of their refusal, absence, or disability, or if they are unknown, to the public treasurer. The certificate to be recorded.²

16. In Connecticut, the land mortgaged, upon foreclosure, is never decreed to be sold. The bill of foreclosure is not a proceeding *in rem*; there is no sale, and possession is not enforced. The mortgagor is allowed fifteen years to redeem, after entry by the mortgagee for breach of condition.³

17. In Georgia, where application is made to the Court for foreclosure of a mortgage, the Court shall order that the debt be paid on or before the first day of the next term—the order to be served and published in a newspaper; and, if not complied with, the Court may render judgment for the amount due, and pass a rule absolute for a sale of the land, as upon execution. The surplus money, if any, shall be paid to the mortgagor. If the mortgagor make affidavit of payments or set offs, which ought to be allowed him, the Court shall submit the matter to auditors.⁴

18. In New Jersey, the statute provides, that possession by the mortgagee twenty years after default of payment shall bar the right of redemption. Upon a bill for foreclosure, the Court may order a sale of the whole, or a sufficient portion of the land, either by a master, or by a sheriff, upon *fiery facias*. But the sale shall pass no greater estate than the mortgagee would have acquired by foreclosure.⁵

¹ 2 N. Y. Rev. St. 191-3.

² N. Y. L. 1837, 455-6.

³ Palmer v. Mead, 7 Conn. 152-3. ⁴ Kent, 181.

⁵ Prince, 168, 423-4.

⁶ 1 N. J. Rev. C. 412, 705.

19. In New Hampshire, the mortgagee may hold for foreclosure, by a peaceable entry with or without legal process after condition broken; or by remaining in possession, with notice of his purpose, if he entered before breach of condition.¹ The time is one year.

20. If the mortgagee remain in possession, a year after condition broken, *with the mortgagor*, this is a sufficient possession to foreclose the mortgage.²

21. In North Carolina, a strict foreclosure has been allowed.³

22. In Ohio, the mortgagee may have a decree of foreclosure, where the debt equals two thirds of the value of the land; and he may demand a sale. In Tennessee, the mortgagor has two years to redeem, after confirmation of the master's sale, under a decree of foreclosure.⁴

23. An equity of redemption may be foreclosed by the act of the mortgagor himself; for, upon a bill to redeem, the plaintiff, in England, is required to pay the debt by a given time, usually six months from liquidation of the debt, in default of which the bill is dismissed; and this proceeding is a bar to a new bill, and equivalent to a foreclosure.⁵

24. In Massachusetts, a tender for the purpose of redemption may be made, even before entry for breach of condition. If not accepted, a tender shall not prevent a foreclosure, unless a suit thereon is commenced within one year thereafterwards. A bill for redemption, offering to pay the money due, may be brought without previous tender; but the plaintiff shall pay costs, unless the defendant has unreasonably neglected or refused to render an account. Substantially the same provision is made in Maine. In the latter State, if the mortgage is given to secure the payment of money only, and the whole is due, after payment or tender, the mortgagor may, by a bill in Equity, compel the mortgagee to give a deed of release, if he has neglected or refused to do it, though not in possession; or he may proceed, as above provided, without a tender. In New Hampshire, payment or tender will render the mortgage void. If the mortgagee refuse to release or to state an account, the mortgagor may *petition* the Court, and, upon his bringing the money into court, if merely *tendered* previously, the Court shall order a discharge, and an attested copy of the decree shall be recorded in the Registry of Deeds. If the mortgagee refuse to state an account, the Court shall ascertain the amount due, and make a similar decree.⁶

25. In Massachusetts, after the death of the mortgagor, only his heir or assignee can redeem.⁷

¹ N. H. St. 1829, 529-30.

² *Gilman v. Hidden*, 5 N. H. 30.

³ *Spiller v. Spiller*, 1 Hayw. 482. (See ch. 37).

⁴ 4 Kent, 181 n. 5 Ham. 554. *Henderson v. Lowry*, 5 Yerg. 240.

⁵ 4 Kent, 185.

⁶ Mass. Rev. St. 636. Me. L. 1837, 439-40. N. H. St. 1829, 530-1.

⁷ *Smith v. Manning*, 9 Mass. 422.

26. The statutory provision, authorizing a mortgagor to bring a bill for redemption without actual tender, after having demanded an account from the mortgagee, has been the subject of judicial construction in several cases.

27. A mortgagee was asked by the assignee of the mortgagor, at the office of the former, in W., what was due on the mortgage. He answered, that he owned the whole estate; and, to a second inquiry, that the records would show. Being asked what money would answer, he replied, nothing but specie; and that, if tendered, he should act his pleasure about receiving it; and, if he took it, he would discharge upon the records. He also said, that his papers were at C., (distant eight or nine miles from W.), and he could not ascertain the sum due. Held, a sufficient demand and refusal, to sustain the bill; but not such an *unreasonable* refusal, as would subject the defendant to costs.¹

28. A mortgagor asked the mortgagee, when absent from the town where the latter resided, to make out and furnish in reasonable time an account of the sum due. He replied, that if the mortgagor would call upon him at home, he would furnish all the information in his power. Without thus applying, the mortgagor brought a bill to redeem. Held, it would not lie.²

29. But where, upon a demand made, the mortgagee said, he had no other account to render than one rendered two years before, which turned out to be erroneous; held, a sufficient demand and refusal, to sustain a bill for redemption.³

30. In Maine, where the mortgagee, or any one claiming under him, has entered for condition broken, the mortgagor, or any one claiming under him, may redeem within three years after such entry, by bringing a bill in Equity. The Court, upon a hearing of the bill, may render judgment according to equity and good conscience, and award execution accordingly; and, if the defendant does not appear, or refuses to comply with the order or judgment, the money shall be paid into court, and execution issue.⁴

31. The question has frequently arisen, whether the foreclosure of a mortgage operates as payment or extinguishment of the debt, or whether the mortgagee may still maintain an action at law for the balance due him, after deducting the fair value of the property. The better opinion is said to be, that such action may be brought. This question also involves the further one, whether the foreclosure is thereby opened, and the right of redemption revived.⁵

32. Judge Story says, if foreclosure of a mortgage operated as payment of the debt, it would frequently prove, in literal exactness of

¹ Willard v. Fiske, 2 Pick. 540.

² Battle v. Griffin, 4 Pick. 6.

³ 4 Kent, 183.

⁴ Fay v. Valentine, 2 Pick. 546.

⁵ 1 Smith's St. 159-63.

language, *mortuum vadium*, a dead and worthless security. If the mortgagee is compellable to make an election, the pursuit of a remedy upon the personal security is an abandonment of the pledge, while an appropriation of the latter is an abandonment of the debt. In a case therefore of suspected insolvency, he would be encircled with perils on every side ; and, instead of a double security for his debt, would be left with scarcely a single plank to save himself in the shipwreck.¹

33. The English authorities, upon both the points above stated, seem somewhat confused and contradictory.

34. It was held, in an early case, that a suit upon the bond after foreclosure opened the foreclosure, and let in the mortgagor to redeem. And Lord Thurlow is said to have declared, that, after foreclosure, so long as the mortgagee kept the estate, he must take it *in satisfaction*, because there was no means of ascertaining how far it paid the debt ; but, after having sold it, he might recover the balance due, in a suit upon the bond. On the other hand, in the case of *Perry v. Barker*, Lord Eldon inclined to the opinion, that, after sale, no suit would lie upon the bond, because the plaintiff had disabled himself to reconvey the estate ; but, at the same time, he remarked that Lord Thurlow had decided that such action would lie, either with or without a sale. In a subsequent hearing of the same case, Lord Erskine held, that a foreclosure was no bar to a suit upon the bond ; but that the mortgagor was thereby enabled to redeem, and, if the mortgagee had sold the land, he would be allowed time to get it back. But he also held, that where this was impracticable, Chancery would restrain the suit by a perpetual injunction.²

35. Judge Story questions the correctness of the rule, which allows a Court of Equity to restrain such suit, before the creditor has received full satisfaction ; and also that, by which the suit is held to have the effect of opening the foreclosure. A foreclosure may well be deemed a *purchase*, at the full value of the land, if less than the debt, and, if greater, at the amount of the debt. Where the value much exceeds the debt, a foreclosure can very rarely take place—it is therefore, of itself, *prima facie* evidence of inferior value. By taking the land, the creditor incurs an inconvenience. If it afterwards fall in value, he is the loser, and therefore he ought to be benefited by any rise in value. If, after foreclosure, the mortgagee should seek further relief *in Equity*, there might be ground for enforcing the principle of reciprocal Equity ; but there seems to be no ground, upon which Equity should decree an injunction, in such case, against the enforcement of *legal rights*. And even if it should thus interfere, where the mortgagee still retains the estate, it would seem that, after a sale, he ought to recover the balance

¹ *Hatch v. White*, 2 Galli. 154. (*Omalv v. Swan*, 3 Mas. 474).

² *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317. *Tooke v. —*, 2 Dick. 785. 8 Ves. 527. 13 Ves. 197.

remaining due. But, at all events, all the decisions concur in the principle, that *at law* foreclosure does not bar a suit for the balance of the debt.¹

36. Judge Story proceeds to remark, that whatever may be the doctrine of Chancery upon the subject, when acting upon its own peculiar principles alone, yet, where a statute expressly limits the right of redemption to a certain time after possession taken, and negatives it afterwards, a foreclosure cannot be opened by a suit upon the bond.

37. In Connecticut, after foreclosure, the mortgagee may maintain an action for so much of his debt as the estate is insufficient to satisfy, estimating the value at the time when the right of redemption expires. And the bringing of such action shall not open the foreclosure.²

38. In New York, it has been decided, that a foreclosure is not opened by bringing a suit for the debt.³

39. But, in Vermont,⁴ it was held to be reasonable, though not actually decided, that the foreclosure should be opened, and that the mortgagor, on being sued, might file his bill to redeem, on payment of debt and costs; and that the mortgagee, when he brings the suit, should have power to reconvey. And, in Massachusetts,⁵ the Revised Statutes provide, that where a mortgagee sues after foreclosure for the balance of his debt, the mortgagor shall have the right to redeem at any time within one year from judgment recovered.

40. The right of redemption may be revived, by the acts of the mortgagee, or by special agreement, even after foreclosure.

41. Thus, the foreclosure is waived by a subsequent acceptance of the money due.⁶

42. A mortgagee, having taken legal possession of the land for foreclosure, afterwards agreed in writing with the mortgagor, that he would reconvey, whenever his debt should be satisfied from the rents and profits or otherwise. After the lapse of three years from entry, the mortgagor brought a bill to redeem, and a redemption was decreed.⁷

43. So, where the assignee of a mortgage, having purchased the land at a sale made under a decree for foreclosure, agreed with the mortgagee, for valuable consideration, to hold the land as security for the sum paid for the assignment, and *in trust* for the assignor; decreed in Equity, that the assignee should reconvey to the assignor upon payment of the sum stipulated, deducting equitable allowances for profits and waste.⁸

44. On the other hand, where a mortgaged estate has been sold, and the mortgagee discharges the mortgage, upon the supposition that

¹ 2 Galli. 159-60-1.

² *Lansing v. Goelet*, 9 Cow. 346.

³ *Mass. Rev. St.* 638.

⁷ *Quint v. Little*, 4 Greenl. 495.

⁵ *Conn. St.* 194.

⁴ *Lovell v. Leland*, 3 Verm. 581.

⁶ *Batchelder v. Robinson*, 6 N. H. 12.

⁸ *Southgate v. Taylor*, 5 Munf. 420.

the sale is valid, and it is afterwards set aside, the mortgage will be revived in Equity.

45. A mortgagee purchased the mortgaged estate at a sale upon execution, and, having received a deed from the officer, entered satisfaction on the mortgage. Upon a bill in Equity filed by the debtor, to set aside the sale as irregular and void, it was decreed that the sale be set aside, and the deed cancelled; but also, that the complainant should pay the amount due to the defendant, within a certain time, or else the mortgage be foreclosed and the land sold.¹

46. In Massachusetts, a widow, claiming dower, cannot maintain a bill in Equity to redeem, where, under the circumstances, she might maintain a suit at law. Hence, the bill must allege, either that the husband mortgaged the land before marriage, or that the wife joined in a mortgage made after marriage—in either case, the title of the wife being a mere Equity, and not a legal estate.²

47. In Virginia, a mortgagor may, in general, redeem, after the mortgagee has purchased the land at a sale made under a judgment for the debt. But if the judgment was recovered as against an absconding and fraudulent debtor, redemption will be refused, upon the maxim, that "he who hath done iniquity, shall not have equity."³

48. Where the mortgagor, in a suit for redemption, pays money into court, and the defendant disputes his right to redeem and prevails, the defendant is not entitled to retain the money. The payment is a *provisional* one, an offer to pay money in discharge of the debt, and for the purpose of removing the incumbrance. The defendant, by his defence, denies that there is any debt secured by mortgage, and his own formal act shows that he has no claim to the money.⁴

49. Where a mortgagor has contracted to convey the right in Equity to a third person, who thereupon, on his own account, pays the mortgage debt to the mortgagee, and the mortgagor afterwards rescinds the bargain; the latter cannot avail himself of such payment, on a bill in Equity to recover the land.

50. The plaintiffs, mortgagors, contracted with C, to sell him the land for \$5000, he providing for the redemption and for payment of the mortgage debt, amounting to \$3000 nearly, and securing the surplus to the plaintiffs. The defendants, the mortgagees, having agreed to convey the land to C, if not redeemed, and to pay him the amount due for redemption, if it should be seasonably demanded. C paid the mortgage debt to the defendants; who, in fulfilment of their agreement, gave a bond to C conformable thereto. Two of the plaintiffs were parties to this arrangement. Their inducement was, that the third plaintiff was absent at sea, and therefore a title could

¹ *Zylstra v. Keith*, 2 Des. 141.

² *Messiter v. Wright*, 16 Pick. 151.

³ *Dabney v. Green*, 4 H. & Mun. 101.

⁴ *Putnam v. Putnam*, 13 Pick. 131-2.

not be made to C except through the defendants, and also an apprehension by the defendants, that the plaintiffs might have a right to redeem without the consent of C. Hence, it was agreed that C should take his title from the defendants, after a foreclosure of their mortgage. Held, the intention and effect of the transaction was, that the defendants assigned the mortgage to C, subject to the remaining Equity, the plaintiffs releasing their equity of redemption, on being paid or secured their shares of the surplus over the mortgage debt; that the bargain between two of the plaintiffs and C, did not depend upon the consent of the absent plaintiff, as the title was to come through the defendants; that C's payment to the plaintiff must be considered as made for himself, upon a purchase of the land, not in discharge of the mortgage, which would defeat the object; that, although the absent plaintiff had no opportunity to assent to the bargain or otherwise, yet, as the other plaintiffs were unable to redeem, the transaction was the best that could be done for him in preventing a foreclosure; and that the plaintiffs were not entitled to redemption.¹

CHAPTER XXXIX.

MORTGAGE—EQUITABLE MORTGAGES AND LIENS.

1. Deposit of title deeds.
9. Lien for purchase money.

42. Lien of purchaser after payment.

1. In *Equity*, the depositing, by the owner of an estate, of *the title deeds* with a creditor, constitutes a mortgage of the estate, as against the owner himself, and any purchaser from him having actual or constructive notice of the fact. This doctrine has been strongly opposed, since its first introduction in 1783, by very distinguished Judges; but it is said to be now firmly established. The rule, however, is construed strictly, and not extended by any implication. Thus, it is held, that all the deeds must be actually and *bona fide* deposited with the mortgagee himself. Nor will a mere parol agreement to deposit or to mortgage be enforced. And merely leaving the title deeds with the

¹ Howard v. Agry, 9 Mass. 179.

mortgagor will not postpone a prior to a subsequent mortgagee, unless there is fraud.¹

2. A lease having been pledged by a person, who afterwards became bankrupt, to the plaintiff, as security for a loan, the pledgee filed his bill for a sale of the leasehold. Held, this was a delivery of the title for a valuable consideration. The Court had nothing to do but to supply the legal formalities; and, in all these cases, the contract is not *to be* performed, but is executed. The Court afterwards ordered the lease to be sold, and that the plaintiff be paid his money.²

3. In a note to this case, it is said, Lord Thurlow held, the deposit of deeds *entitled the holder to have a mortgage*, and to have his lien effectuated; and, although there was no special agreement to assign, the deposit affords a presumption that such was the intent.

4. So, where the title deeds of an estate were deposited with the plaintiff as security, and the defendant, fourteen years afterwards, when the owner was upon the point of bankruptcy, took a mortgage, ante-dated, and purporting, but untruly, to be for money then advanced; and the defendant had notice of the deposit, but avoided inquiring for what purpose it was made; held, in a bill brought by the plaintiff against the defendant for foreclosure, that the latter should either pay the plaintiff's demand, or stand foreclosed, &c. The Court remarked, that the deposit of title deeds as security is evidence of an agreement to make a mortgage, and the agreement is to be carried into execution by the Court against the mortgagor, or any one claiming under him, with notice express or implied.³

5. Lord Eldon said, the decision, that a mere deposit of deeds shall be evidence of an agreement for a mortgage, is much to be lamented. It has led to discussion upon the truth and probability of evidence, which the very object of the Statute of Frauds was entirely to exclude. In another case, the same Judge declared, that a deposit of deeds should not be considered as a mortgage, except in a clear case, and he refused so to treat it in the cause before him.⁴

6. Sir William Grant remarked, that the mere fact, that one man's title deeds are found in another's possession, is not conclusive of any purpose to mortgage the estate. It may exist, without any contract whatever. Where the deposit is made when the money is advanced, it is obvious that the purpose of the deposit must be to secure the repayment of the money, and there is little to be supplied by other evidence. The connexion is not so direct, between a debt antecedently due and a subsequent deposit; nor is the inference so plain. And where the deeds are delivered, not as a present security, but only for the purpose of enabling the attorney to draw a mortgage, which has been agreed for; the principle is wholly inapplicable. The deposit of deeds is indeed held to imply an obligation to execute a conveyance, whenever required. But, in such case, the primary

¹ 4 Kent, 149-50.
Birch v. Ellames, 2 Anst. 427.

² Russel v. Russel, 1 Bro. 269 and n.
³ Ex parte Haigh, 11 Ves. 403-4 and n.

intention is, to execute an immediate pledge; with an implied engagement to do all that may be necessary to render the pledge effectual for its purpose. But in the case supposed, there was no intention to put the deeds into pledge. Nor does the death of the owner, before making the proposed mortgage, give any effect to the transaction as a deposit.¹

7. So Lord Eldon remarked, that it was an error to suppose, that a deposit of deeds can refer to nothing but an intention to subject the estate. A deposit may be of considerable use, without any such object. The right to hold them, and so to work out payment, is of great value.²

8. It is understood to have been the old rule in the English Chancery, that if a first mortgagee voluntarily left the title deeds with the mortgagor, he should be postponed to a subsequent mortgagee without notice and in possession of the deeds; because he thereby enabled the mortgagee to impose upon others, who, in the absence of a registry, could look for their security only to the deeds and the possession of the mortgagor. Chancellor Kent, however, is of opinion, upon a review of the cases, that there is not the requisite evidence of the existence of any such rule in Equity, as has been stated by some of the Judges; or, if it once existed, that it has been changed. He says, the settled rule is now, that this circumstance will not defeat a prior mortgage, unless accompanied with fraud or gross negligence, or a voluntary, distinct and unjustifiable concurrence, on the part of the first mortgagee, to the retaining of the deeds. And, in the United States, where the registry system generally prevails, the alleged rule is still less applicable. Hence, where a leasehold is mortgaged, the leaving of the lease with the mortgagor is no evidence of fraud, because the registry is a beneficial substitute for the deposit of the deed, and gives better and more effectual security to subsequent mortgagees.³

9. Analogous to the lien just mentioned, is the equitable lien which the vendor of land has against the purchaser, for the price of the land, or such part of it as remains unpaid. Chancellor Kent says, this right, said to be derived from the civil law, is well established in England, and has been recognised in the States of Kentucky, New York, Connecticut, Ohio, Tennessee, North Carolina, Indiana,* and by the Supreme Court of the United States. In Connecticut, however, it has been somewhat qualified. In Pennsylvania, the right was formerly assumed to exist, but has been since denied. The same author and Judge Story give the following general view of the law upon this subject.⁴

¹ *Norris v. Wilkinson*, 12 Ves. 197-8-9.

² *Ex parte Hooper*, 19 Ves. 479

³ *Berry v. Mutual, &c.* 2 John. Cha. 608-9. *Johnson v. Stagg*, 2 John. 510.

⁴ 4 Kent, 151-3. 2 Story, 461-71.

* And in Virginia and Georgia (2 Yerg. 85). Judge Marshall says, it has not been extensively recognised. 7 Wheat. 52.

10. To constitute this lien, no possession is required, and it applies equally, whether the transaction is a sale or a mere executory contract. Although sometimes placed upon the footing of an express agreement or assent, it is now held to be independent of any such consideration.

11. The lien in question is *prima facie* presumed to exist, but may be negated by special circumstances. Thus it does not exist, where the object of the sale was not money, but some collateral benefit. It was once held, that the lien was defeated by the vendor's taking an express and distinct security, such as a bond or note, for the price; but this rule is now so far qualified, that the lien is destroyed only by the taking of *collateral security*, whether in property or in the engagement of some third person. The giving of a receipt upon the deed for the consideration does not destroy the lien.

12. This lien is valid as against the purchaser, his heirs, &c., and all purchasers with notice or without consideration; but not against creditors holding under a bona fide conveyance, or subsequent purchasers without notice.

13. The lien of a vendor upon land sold, for the purchase money, may be classed as a *constructive trust*, not within the Statute of Frauds. It is said to be neither *jus in re*, nor *jus ad rem*, neither property nor a right of action; but a *charge*.

14. The history of the doctrine, that the vendor of land has a lien for the unpaid purchase money, is thus given by Chancellor Walworth, in the case of *Fish v. Howland*.¹

15. The earliest case is *Chapman v. Tanner*, in 1684 (1 Vern. 267). In that case, Lord Guilford held, that the vendor of land, to one who had become bankrupt, had a lien for the price, upon a principle of natural equity, and did not stand as a general creditor. But it is said, there was a special agreement, that the seller should retain the title deeds (Amb. 726, 1 Bro. 424, n. b).

16. In *Bond v. Kent* (2 Vern. 281), a mortgage was given for a part of the price, and a note for the rest. Held, there was no lien for the latter sum.

17. In *Coppin v. Coppin* (2 P. Wms. 291), Lord King held there was a lien, notwithstanding the endorsement of a receipt for the price upon the deed.

18. In *Pollexfen v. Moore* (3 Atk. 272), Lord Hardwicke charged the land with the lien in the hands of an heir. But the conveyances were there retained.

19. In *Burgess v. Wheat* (1 Eden, 211), the general principle is recognised.

20. In *Tardiff v. Schrugan* (cited 1 Bro. 423), a man conveyed an estate to his two daughters, in consideration of an annuity, and

¹ 1 Paige, 24-30.

they gave a joint bond therefor. One of them married and died; and her husband, having a life interest in a moiety of the land, refused to pay any part of the annuity. Upon a bill filed by the other sister and her husband, Lord Camden held, that a moiety of the annuity was a lien upon the land in the hands of the defendant; and decreed, that he should pay a moiety of the arrears, and keep down a moiety of the future payments.

21. In *Farwell v. Heelis* (Amb. 724), Lord Bathurst held, that taking the bond of the purchaser, payable at a future time, was a discharge of the lien. (It is said, however, that this case has been often overruled.)

22. In *Blackburn v. Gregson* (1 Bro. 420, 1 Cox. 90), the same question was agitated, but not decided.

23. In *Austin v. Halsey* (6 Ves. 475), where a legatee claimed the privileges of the vendor in asserting a lien, Lord Eldon recognised the rule, that the vendor has such lien, as against the purchaser, unless the contract clearly shows a contrary intent.

24. In *Nairn v. Rouse* (6 Ves. 752), Sir William Grant admitted the general rule, but remarked that, if the vendor does not trust to the lien, but carves out a security for himself, it is doubtful whether the lien is or is not waived.

25. In *Elliot v. Edwards* (3 Bos. & P. 181), the holder of a lease assigned it, with a proviso that the assignee should not transfer, &c. until payment of the price, and took security from a third person. Held, the vendor still had a lien for the price.

26. In *Hughes v. Kearney*, (1 Sch. & Lef. 132), the purchaser gave his note for the purchase money, which was put into the hands of a third person as trustee, until the incumbrances upon the estate could be ascertained and paid off therefrom, and the balance to be paid to the vendor. Held, the balance of the purchase money, included in the note, was a lien upon the land in the hands of an heir.

27. In *Mackreth v. Symmons*, (15 Ves. 329), where a bond was given for the purchase money, there was held to be a lien. Lord Eldon intimated, that taking a mortgage upon another estate, as security, might not be a waiver.

28. In *Grant v. Mills*, (2 Ves. & Bea. 306), the lien was held not to be waived, by the purchaser's drawing bills upon himself and partner, obtaining an acceptance of them, payable at a future time, and delivering them to the vendor. The bills were viewed, not as security, but only as a mode of payment. So, in *Ex parte Peake*, (1 Mad. 346), it was held that a bill, and in *Ex parte Loaring*, (2 Rose's Cas. in Bank. 79), that a negotiable note, on time, which was discounted and afterwards dishonored, was no waiver of the lien. The same point was settled as to a note or bond, payable on time, in *Sanders v. Leslie*, (2 Ball & Bea. 514). A more recent case is referred to in a note of *Simons & Stuart*, settling the same point as to a bond, although in that case there were peculiar covenants, and other circum-

stances, which were held to make an exception to the rule. (*Ex parte Parkes*, 1 Glynn & Jame. 228). But in *Winter v. Lord Anson*, (1 Sim. & Stu. 434), where the purchaser gave his bond, payable at the death of the vendor, with interest annually, and a receipt for the money was endorsed upon the deed; held, the vendor's intention was evidently to part with the estate immediately, and to wait for the price, and therefore there was no lien.

29. The American cases upon the subject are said to be uniform,¹ with a single exception in South Carolina—*Representatives, &c. v. Comptroller*, (2 Des. 509), where it was held, that a bond payable on time defeated the lien.

30. In Kentucky, the general rule is recognised in *Francis v. Hazlerigg*, (Hard. 48), and *Cox v. Fenwick*, (3 Bibb, 183); but it also held, that if the vendee takes distinct and independent security, such as the promise of a third person, or if other circumstances indicate that the vendor does not rely upon the land, the lien is waived. The same principle is recognised in Virginia. (*Cole v. Scott*, 2 Wash. 141; *Willson v. Graham*, 5 Munf. 297), and by the Circuit and Supreme Courts of the United States; and the general rule, by Chancellor Kent. (*Garson v. Green*, 1 John. Cha. 308).

31. A deed was made by a grandfather to his grandson, in consideration of love and affection and divers other good considerations, and with the purpose of disposing of the grandfather's property after his death, and securing a legacy to his son; and that he in the mean time should retain control of the land, so far as to secure a support. For this purpose, the grandfather took back a life-lease at a nominal rent, and a bond, conditioned (virtually) that whenever the grandson neglected to provide a support for him, he might resume possession or claim rent. Held, these facts showed, that the vendor did not rely upon any implied lien, but carved out his own security for his support by a direct incumbrance upon the land, and that this express lien for a part of the consideration, negatived the right of any implied lien for the residue.²

32. The death of the vendee of real estate does not avoid the lien for the purchase money. For the heir cannot be permitted to hold, what his ancestor unconscientiously obtained. And, after recovering a judgment at law against the administrator of the vendee, upon a note given for the purchase money; upon a deficiency of personal estate, the vendor may have a decree in Chancery to have the estate sold.³ It has been contended that the English law, enforcing such lien against an heir of the vendee, could not be regarded as applicable, in a State where the lands of one deceased are bound for his debts in the

¹ 1 Paige, 29.

² *Fish v. Howland*, 1 Paige, 20.

³ *Garson v. Green*, 1 John. Cha. 308. 1 Sch. & Lef. 132.

hands of the heir, without any express obligation upon the latter. But the objection was considered by the Court as without weight.¹

33. A vendor has no lien upon the land for his purchase money, unless his object is money. He must rely upon his lien on the land, there being no other security. Hence, where a father conveyed to his son, taking back a bond, for the support of himself and his wife for life, and a lease of a part of the premises for the same term; held, such lien did not exist.²

34. A purchased land of B, without paying for it, and conveyed it to C. C gave back two mortgages to A of equal date, for parts of the consideration, intending that one of them should be assigned to B, as security for the purchase money, and have priority, according to an original agreement between A and B. The mortgages were simultaneously recorded; but the one designed for B was first assigned to him, and afterwards the other was assigned to D *bona fide* and for full value. Held, D took his mortgage subject to B's Equity against A; that the statute of registry had no application to this case, as between B and D; that A took B's mortgage as trustee for B; that the principle, by which a lien is waived by the taking of collateral personal security from a third person, did not apply here, because C was in fact the vendee, and the mortgage was upon the land itself; that the implied waiver of a lien (it seems) can be set up only by purchasers without notice; and that B's title should prevail.³

35. The assignee of a vendor may enforce a lien upon the land for the purchase money, as well as the vendor himself.

36. A conveyed to B, who paid \$1000, and gave a bond for \$2000, payable in two years, and containing a memorandum below the seal, that the land should be liable for the \$2000 till paid. A assigned the bond to C, but, a few days previously, B conveyed the land to D, who had loaned him \$1200, taking back a bond of defeasance. D had notice of the bond from B to A, and of its endorsement. C brings a bill in Equity against B and D, praying a sale of the land. Held, D, as an assignee with notice, was chargeable with the lien; and, on a similar principle, C, as an assignee of A, should have the benefit of it; that an equitable lien was assignable as well as a legal mortgage. Decreed, that C should recover the amount due, or, if not paid in a certain time, the land to be sold.⁴

37. It has been doubted, whether *creditors* of a vendee, acquiring his land, shall, like *purchasers* without notice, hold it discharged from the equitable lien of the vendor for the purchase money. But the Supreme Court of the United States have decided, that as against creditors, as well as purchasers, the lien does not exist, more especially where they hold under a mortgage.

¹ *Eskridge v. McClure*, 2 Yerg. 84.

² *Meigs v. Dimock*, 6 Conn. 458.

³ *Stafford v. Van Rensselaer*, 9 Cow. 316. 1 Hopk. 569.

⁴ *Eskridge v. McClure*, 2 Yerg. 84.

38. In 1792, A purchased land from B, and sold it to C, who took his title from B. C gave A a bond for the price, which in March, 1796, was surrendered, upon his accepting bills for the amount, some of which were never paid. In September, 1796, C conveyed the land, with other lands, to D in trust for E, who was a surety for C to a large amount, and also to secure him for future advances and liabilities. In March, 1797, D conveyed the land to F, in trust for the purposes mentioned in the deed from C to D. In June, 1797, C (with two others) conveyed the land, together with other lands, to F, for the payment of their debts. Some doubt having arisen respecting the registration of these deeds, F brought a suit against C, and recovered judgment, and the land was bought upon execution for them, and afterwards conveyed to them upon the former trusts. Both A and C had become insolvent, and had been discharged under the bankrupt or insolvent laws. A, and a trustee for the creditors of A, bring a bill in Equity against C and F, to subject the land to payment of the original purchase money. F alleges, that he had contracted to sell the land to C, but, as he had not paid the price, he (F) still retained the legal title. Held, that the lien of the plaintiff should not prevail against the claim of F on behalf of creditors. Chief Justice Marshall remarks, that whether the lien of a vendor be established as a *natural equity*, or from analogy to the principle that a *bargainor* holds in trust for the bargainee till payment of the price; still it is a secret, invisible trust. The vendee appears to hold, divested of any trust; and gains credit upon the confidence that he is the owner in Equity as well as at law. A vendor ought to take a mortgage, for the purpose of general notice; otherwise, he is in some degree accessory to a fraud. It would seem inconsistent with the principles of Equity, and with the general spirit of our laws, that such a lien should be set up in a Court of Chancery, to the exclusion of bona fide creditors. In the United States, the claims of creditors stand on high ground. There is not, perhaps, a State in the union, the laws of which do not make all conveyances not recorded, and all secret trusts, void, as to creditors, as well as subsequent purchasers without notice. To support the secret lien of the vendor against a creditor, who is a mortgagee, would be to counteract the spirit of these laws. Judge Marshall examines the conflicting English decisions upon this subject, and also the observations of Mr. Sugden, which seem to favor an opinion contrary to the judgment in this case; and he draws a distinction between an assignment made under a bankrupt or insolvent law, which is not regarded as made for valuable consideration, but merely places the assignee in precisely the same situation with the assignor; and a conveyance made by the mere act of the party, for the security of one or more creditors, or of creditors generally.¹

¹ Bayley v. Greenleaf, 7 Wheat. 46.

39. Whether, if A sells an estate to B, which A purchased from C, but B takes his title directly from C, A can enforce an equitable lien upon the land, never having had a legal title, *qu.*¹

40. In Indiana, it would seem, a valid title to real estate may pass by mere agreement, accompanied with delivery of possession. But, in case of such agreement, the vendor may reserve an express lien upon the property, for payment of the purchase money.

41. A agreed with B, by a sealed instrument, to sell B certain land and a steam engine, the price to be paid in three years; B to have immediate possession of the land, and, after erecting a mill-house, to have the engine also, which was to remain on the land till payment of the purchase money, when a title was to be made. B took possession of the land, built the house, and put the engine in operation. In September, 1821, A assigned the agreement to C, and in July, 1824, C assigned it to D. In March, 1823, a judgment was recovered against A, and the land sold on execution. D brings a bill in Equity against the execution purchaser, claiming a lien upon, and praying a sale of the property, to satisfy the claim for the purchase money. Held, the doctrine of *implied* lien was inapplicable to this case; that the agreement not to remove the engine gave an express lien upon it, and the express covenant, that the title should remain in A till the price was paid, created a lien upon the land; that the lien was assignable, and, after the assignment to C, there remained in A only the bare legal title, which he held in trust for the purposes of the contract; and that the execution purchaser, having notice, took the estate, subject to the same trust. Sale decreed, with an injunction to the persons in possession, &c.²

42. In Pennsylvania,³ where a writing had been executed, conveying by words of actual grant, but called *an article of agreement*, and looking to a future conveyance, there being a covenant to convey afterwards by good and sufficient deed; Chief Justice McKean stated the question as being, whether the party did sell and convey, or only agree to do it; and then suggested the further doubt, whether the taking of a bond for the price was not a waiver of the lien. In a subsequent case,⁴ however, the Court remark, that the doctrine of equitable lien could not apply, in that case, because *the legal title* still remained in the proposed vendor. In the same case, the English doctrine upon the subject is rejected, as having been first introduced in England, three years after the charter to William Penn; as impracticable in a State having no Court with full Equity powers; as being alike opposed to the general understanding and practice of the people, and to the universal policy of the law in regard to the registration of deeds, the liens of mechanics, judgment creditors, creditors of deceased per-

¹ Bayley v. Greenleaf, 7 Wheat. 50.

² Stauffer v. Coleman, 1 Yeates, 393.

³ Kauffett v. Bower, 7 Ser. & R. 64.

⁴ Lagow v. Badollet, 1 Black. 416.

sons, &c.; and as leading to the utmost confusion and uncertainty of titles. It is said, that only two cases in Pennsylvania have ever recognised the doctrine in question; one of them being that already referred to; and the other, (*Irvine v. Campbell*),¹ being also a case of the purchase of a mere equitable title, inasmuch as the instrument was in the form of an executory agreement, and contained a covenant for further assurance.

43. A lien, similar to that just described, is the lien of a purchaser of land, who has paid the purchase money *prematurely* or by *surprise*, that is, before receiving a conveyance. This right, however, has been asserted in very few cases, and the existence of it has been seriously questioned.²

CHAPTER XL.

LIEN OF MECHANICS, ETC. FOR LABOR AND MATERIALS.

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|---------------------------|------------------------------------|
| 1. Lien by legal process. | 10. Massachusetts. |
| 2. Lien of mechanics, &c. | 11. Connecticut. |
| 3. In Rhode Island. | 12. Georgia. |
| 4. Tennessee. | 13. Maine. |
| 5. Indiana. | 14. Kentucky. |
| 6. Pennsylvania. | 15. Alabama. |
| 7. Illinois. | 16. Decisions in Massachusetts and |
| 8. Missouri. | Pennsylvania. |
| 9. Mississippi. | |

1. UNDER the general title of *estates on condition*, and in immediate connexion with the subject of *mortgages*, may properly be considered certain other *liens*, which one man may acquire upon the land of another, as security for a debt. Of these, perhaps, the most important is the lien acquired by means of *legal process*—consisting either in an *attachment*, made at the commencement of suit, or in a *judgment* or *execution*, in which the suit terminates. These, however, will be considered in another portion of this work, relating to the methods of *acquiring title* to real property.

2. There is another species of lien, unknown to the common law, and originated of late years by express statutes in many of the States; viz. the lien of *mechanics*, and *material-men* or furnishers of materials, upon the buildings which they erect or provide for. There is a general similarity in the laws of those States which have legislated

¹ 6 Bin. 118.

² 2 Story, 463 n.

upon this subject, but it may be worth while briefly to state their respective, specific provisions.

3. In Rhode Island, mechanics and material-men may have a lien upon buildings, canals, turnpikes and railroads, and the land over which they are constructed. If the party claiming a lien is a *sub-contractor*, he must notify the proprietors that he has been employed, within thirty days from the time of being thus employed, and that he claims a lien. The lien continues four months from the time when the last payment falls due. In three months from completion of the work, an account shall be filed in the office of the town or city clerk. Otherwise there shall be a lien only against the employer. The remedy is a suit for sale of the property. But this is subject to the claim of any prior attaching creditor upon the value of the property as it was at the time of his attachment. Notice is given to all lien creditors, and all recover their claims, and may contest those of each other. If the whole services have not been rendered, without fault of the creditor, he has a claim for a part. A tenant shall have no lien for repairs of the demised premises, unless assented to by the landlord.¹

4. In Tennessee, a mechanic, supplying work and materials by special contract, has a lien upon the building and the land, not exceeding one acre. The lien is paramount to all legal process, except a judgment prior to the commencement of the building. A suit must be brought in one year from completion of the work; or within six months in *Davidson county*.^{2*}

5. In Indiana, mechanics, &c. have such lien, jointly or severally, for any amount over thirty dollars. The remedy is a bill in Chancery, commenced in one year from the furnishing of materials or completion of the work. All may join in such bill, or one may file a bill alone against the others and the employer. The property shall be sold, and the proceeds proportionably distributed. But the lien may be discharged by the filing of a bond. The act applies only to new erections, or contracts for repairs made *with the owner*, not those made with a *mere tenant*. Notice shall be filed and recorded in a public office within sixty days from the time when the debt becomes due.³

6. In Pennsylvania, mechanics and material-men, including those who furnish *curb-stone* for pavement, have a lien from the commencement of the building. It continues only two years therefrom, unless, in six months from the performance of the work, &c. a suit is brought, or claim filed with the prothonotary of the county. And satisfaction, when made, shall be entered upon the record, under penalty of one half the sum sued for or claimed by the creditor. The suit may be a personal action, or a writ of *scire facias*. In the latter, the building itself is alone liable. The statute is limited in its operation to certain enumerated towns and counties.⁴

¹ R. I. St. 1834, 829. Ib. 1836, 939.

² Ind. St. 1834, 165-7.

³ Ten. St. 1825, 32; 1829, 47.

⁴ Purd. Dig. 595-6-7.

* The act applies, only where one person undertakes and completes the building.

7. In Illinois, a lien is given to any one, who contracts with the owner of land to erect or repair a building or machinery, or to furnish labor or materials; also to any one who supplies materials, which are used for this purpose. A suit shall be brought within three months from the time fixed for payment, and execution issue against the property only.¹

8. In Missouri, artisans, builders, mechanics and laborers, doing labor or furnishing materials for a building, under a contract with the proprietor, shall have a lien upon such materials and work, each for his own. A sworn account shall be filed with the clerk of the Court, within six months from the time when the debt falls due, and by him recorded. The account shall contain a description of the property. A suit may be brought within twelve months from completion of the work; either in common form, in which case execution shall issue against the property in question, only to the amount of the plaintiff's proportional lien, if the defendant was owner or possessor of the property at the time of the contract, and also against his property generally; or by *scire facias* against the original debtor and all persons owning or possessing the property, and in this case execution shall run against the property alone. When a claim of this kind has been paid, the creditor shall, under penalty of forfeiting the amount of his lien, acknowledge satisfaction to be put upon the record, as in case of mortgages. The lien extends to a convenient space of land, not exceeding five hundred square feet clear of the building, if owned by the contractor.²

9. In Mississippi, mechanics, &c. have a lien in the city of Natchez. The proceeds of sale are distributed among the several claimants. The lien continues only two years from commencement of the building, unless a suit is brought or claim filed within six months from the doing of the work or finding of materials. "A written contract of agreement" is to be recorded within three months from the time of making it. And the lien is discharged, like a mortgage, upon the record.³

10. In Massachusetts,⁴ any person furnishing labor or materials, by contract with the owner of land, for erecting or repairing any building thereupon, may acquire a lien upon the same. The contract must be written, signed by or for the owner of the land, and recorded. The lien continues only six months after the money is finally payable, unless during that time a suit has been brought. When any sum remains unpaid sixty days after it is due by the contract, the creditor may by petition obtain a decree for a sale of the land. The petition may be filed in court or in the clerk's office. It shall contain a brief statement of the contract, and the sum due, and a description of the land. The Court shall order notice to the debtor, and to all others holding similar liens upon the land. The owner may contest any or

¹ Illin. Rev. L. 447.

² Missi. St. 1819, p. 32.

³ Misso. St. 108-9.

⁴ Mass. Rev. St. 684-9.

all the claims, and the several claimants may contest those of each other. The Court shall allow the several demands, whether immediately payable or not, if not conditional ; with a *rebate* of interest if payable at a future time. If the creditor has been prevented from an entire performance, without his own default, by the failure of the debtor to perform, the former shall recover a proportional part of the amount contracted for. If either of the creditors establishes his lien, the Court orders a sale by an officer of the whole land, or such part as will satisfy the claims, if for the interest of the parties. The mode of selling and the right of redemption are the same as in case of the sale of equities of redemption. The officer may be ordered to make distribution of the proceeds, or, if the claims are not all ascertained at the time of sale, to bring the money into court ; and, if circumstances so require, the Court may make several orders of distribution. The surplus proceeds are paid over to the debtor, but are liable to attachment or execution before such payment. Where the property has been attached before the contract was recorded, the attachment shall be a prior lien upon the value of the property as it was when attached ; and the creditor, having recovered judgment, shall be paid the proportion due him according to this estimate. If the attachment is subsequent to the recording, the latter has the same priority as any prior attachment would have. Attachments are paid according to priority ; but when lien creditors have equal rights among themselves, and the fund is insufficient to pay the whole, they are paid proportionally. The lien shall attach to estates less than a fee, and to equities of redemption, if the employer has these interests in the land. If the employer die, or convey away his estate, his heirs or assignee may be made parties to the suit. If he die after suit brought, it may proceed against his heirs or assigns. If the creditor die before or after suit brought, it may be commenced or prosecuted by his executor, &c. If the petitioning creditor fail in his suit, other creditors, made parties, may still recover. If the former commence the suit within the sixty days, but other creditors prosecute it, he may still recover, but shall have no costs, and may be required to pay them. These provisions are no bar to any common law remedy for the debt. After payment, satisfaction shall be entered or a release given, as in case of mortgages.

11. In Connecticut,¹ where a person performs labor, or furnishes materials, in the erecting or repairing of a building, in a city, to the value of more than two hundred dollars, he shall have a lien upon the land and building, paramount to any other lien which is acquired subsequently to the commencement of such services. Upon this lien, the property is subject to *foreclosure*, as on a mortgage. The lien of any claimant continues only sixty days after the completion of his work,

¹ Conn. St. 1836, 22.

unless he lodge with the town clerk a written notice or certificate, describing the premises and the amount claimed, which shall be sworn to and recorded. After satisfaction of the lien, or a judgment that nothing is due, the claimant, on request of any party interested, shall file a certificate of such fact, which shall be recorded, and operate as a discharge. For a neglect to file such certificate in ten days, he forfeits a sum not exceeding one half of the debt claimed.

12. In Georgia, an act, passed in 1835,¹ provides, that the second section of a former act shall not affect any claim which does not exceed thirty dollars. If the claim is for a less sum, the lien may be preserved without recording. The requisition also, in the fourth section, that a suit be brought in six months, is repealed. But in Prince's revision of the laws of Georgia, which purports to come down to 1837, there is contained no statute upon this subject.

13. In Maine,² a person agreeing, in writing, to erect, repair, or alter a building, or to furnish labor or materials therefor, may acquire a lien upon the house and land, or the equity of redemption therein. Within ninety days from the time stipulated for payment, the lien shall be secured by attachment, and shall have precedence of all other attachments. The contract must have been recorded, within ten days from the making, in the office of the town clerk. A tender of the sum due discharges the land.

14. In Kentucky,³ persons furnishing labor or materials (*journeymen* excepted), for the construction or repair of any building in *Lexington*, have a lien upon the land according to their respective interests, and to the extent of the employer's estate therein. If the latter claim the land by an executory contract, which is afterwards set aside or rescinded, the lien shall continue against the owner of the land, so far as he is benefited by the services. If the employer is evicted from the land, and has a claim for improvements against the owner, the person claiming a lien shall be substituted for him to the extent of his lien. Private corporations, trustees for charity, &c. are included in the act. In six months from the completion of the erecting, repairing, or furnishing materials, or from the cessation of services by order of the employer, an account shall be filed with the clerk of the court, specifying the lien, which shall be notice to all the world. The party gains no lien, unless he follows this course, or proceeds by suit to enforce the lien; in which case the *lis pendens* commences with the filing of the bill. The proceeding is governed by Equity rules as to liens and priorities.

15. In Alabama,⁴ all master builders and mechanics, contracting to erect buildings, or to do jobs of work upon the same, shall have a lien thereupon for all their dues, unless the contrary is agreed, when the contract is made. But the contract must be written and signed,

¹ Geo. St. 1835, 146.

² Ky. St. 1837, 215-6.

³ Maine. St. 1837, 418-9.

⁴ Aik. Dig. 308.

or the amount liquidated between the parties, and a net balance struck in favor of the claimant; or an award made in his favor upon submission to arbitration; or a judgment recovered by him. And, if his claim is contested, even where a net balance is struck, he shall proceed at law to judgment and execution, as also where there has been a reference to arbitration, and an award in his favor. The contract shall be recorded with the clerk of the Court within thirty days from the time of making.

16. In Massachusetts,¹ to a petition under the statute above-named, the owner of the land may appear and defend, though not a party to the contract.

17. If the employer is either an intruder or a particular tenant, the party rendering the services can acquire no lien upon the land or building, as against the general owner of the land. The legislature could not constitutionally thus enable one person to violate the right of property of another. And the language of the statute shows that it is intended to be applied only where the employer is the owner of the property. Upon any other construction, the provision, that an *equity of redemption* shall be subject to the lien, would be wholly unmeaning.²

18. In Pennsylvania, several persons, principally mechanics and material-men, entered into an agreement under seal; reciting, that they had each agreed to erect a brick house upon certain land, the houses to be of uniform materials and appearance, and agreeing that each would furnish to the others certain materials and workmanship to be used about the houses; and that no lien should be filed, or claim made, against either of the other parties, for any labor or materials furnished, except against the party, or for the buildings, which each shall have agreed to erect, and for such labor and materials only as shall be contained in such building respectively, &c. A, one of the parties, filed a lien against the house of B, for lumber. Upon trial of the *scire facias*, it appeared that some items of the plaintiff's bill were not specifically furnished at the date. Held, it was unnecessary to prove, that the particular articles were furnished to B's house; that the agreement was fulfilled, if B was charged only with his due share of the materials, and that it was a wrong instruction to the jury, that if the particular articles were not actually used upon the building, the plaintiff had failed to file his claim within six months, and therefore could not recover.³

19. Where a mechanic, &c. has agreed with a builder or architect, to furnish labor or materials for the building of a third person; such builder, &c. must be made party to the *scire facias* upon the claim.⁴

20. Where a mechanic, &c. brings a personal action against the

¹ Thaxter v. Williams, 14 Pick. 49.

² Croeskey v. Coryell, 2 Whart. 223.

³ Ibid.

⁴ Barnes v. Wright, Ib. 193.

owner of a building, who prevails therein, this judgment is a bar to a *scire facias* to enforce the claim against the building.¹

21. Where several mechanics file liens against the same building, a sheriff's sale upon one of them defeats and discharges all the others, and the purchaser takes a clear title. The proceeds of sale are rateably divided among the whole.²

22. A *scire facias* upon a mechanic's lien, being a proceeding *in rem*, does not lie after a judicial sale of the property to which the lien attaches.³

23. Such lien may be entered against a lessee of the property, who contracted for the erection of the building.⁴

24. A mechanic's lien attaches to an engine by which a steam saw-mill is propelled, it being a part of the building.⁵ So also, it seems, a person has a lien, who furnishes lumber for the shelves of a vault, which formed a part of the original plan of the building.⁶

25. Such lien, being wholly created by statutory provision, will be strictly limited, as to place, by the terms used in the statute. Hence, where an act extended the provision to the village of L., and a building was described in the original lien, and in the *scire facias*, as *between* the turnpike and the village, and was proved to be upon an out-lot adjoining it—held not to be within the act.⁷

26. In a suit to enforce a mechanic's lien, the defendant may set off a claim for unliquidated damages, founded upon the plaintiff's breach of contract to erect the building.⁸

27. A mechanic brings a suit of *scire facias*, under the lien law, against A as owner, and B as contractor, in which the defendants prevail. He afterwards brings another *scire facias*, against C as owner, and B as contractor. Held, the judgment was no bar to the second action, as a *former recovery*.⁹

28. A *scire facias* must make the owner of the building a defendant.¹⁰

29. An unfinished house in Philadelphia was sold, and a mortgage given back for the purchase money, and immediately recorded. The mortgagee proceeded with the building. Held, persons furnishing labor and materials after the mortgage was recorded, had a claim prior to the mortgage.¹¹

30. To give a lien under the act of 1806, it is sufficient that lumber be delivered for a building, though at a shop distant from it; and though not actually used. So a lien attaches, though the materials be not used in a usual or necessary manner.¹²

¹ Whelan v. Hill, 2 Whart. 118.

² Ibid.

³ Morgan v. Arthurs, 3 Watts, 140.

⁴ Tilford v. Wallace, 3 Watts, 141.

⁵ Hampton v. Broom, Miles, 241.

⁶ American, &c. v. Pringle, 2 S. & R. 138.

⁷ Hinchman v. Graham, 2 Ib. 170. Harker v. Conrad, 12, 301.

⁸ Anshutz v. McClelland, 5 Watts, 487.

⁹ Ibid.

¹⁰ Harker v. Conrad, 12 S. & R. 301.

¹¹ Bayne v. Gaylord, 3 Watts, 301.

¹² Ibid.

31. Taking a bond with warrant of attorney, and entering judgment on it, are not filing a claim or instituting a suit, within the meaning of the lien law.¹

32. A joint lien may be filed against several houses belonging to one person. If two houses, contracted for together, are contiguous, the party may either file one lien against all, or a separate one against each, making a fair and rateable apportionment of the amount claimed.²

33. If one, having separate liens for materials furnished for two houses, receives a payment without appropriation by himself or the debtor, and allows his lien upon one of the houses to expire, and the other house is sold to a *bona fide* purchaser; the lien cannot be enforced for the whole amount against the latter alone, upon the ground that the payment of money is applied to satisfy the claim upon the former.³

34. But, in case of a joint lien, each building is liable for the whole claim, to the exclusion of all subsequent incumbrances.⁴

35. An agreement to receive payment, partly in cash, and the balance in lumber at fair prices whenever called for, &c., and the acceptance of a guarantee from a third person for the fulfilment of this contract, are no waiver of a lien upon the building by a material-man.⁵

36. The *commencement* of a building, within the meaning of the lien law, is the first labor done on the ground, which is made the foundation, and to form a part of the work suitable and necessary for its construction; and this is unchanged by any change in the ownership of the land and building, or in the plan, provided the original design of its character remains.⁶

37. A lien is limited to such quantity of ground, as is necessary to the proper enjoyment of the building, according to the owner's intention at the commencement.⁷ It is also limited to the description in the claim filed. Thus, a claim against the building and the lot on which it is erected, does not embrace adjoining ground as appurtenant to the building.⁸

38. Mechanics' liens shall be paid from the proceeds of property, sold upon a judgment and execution.⁹

39. A, having purchased lumber from B, to be used in a building, came into possession of a note signed by B, payable in lumber to a larger amount than that received by A, and afterwards purchased of B more lumber, exceeding the amount of the note. A and B agreed that the note should go to the account of another building, upon which B lost his lien by neglecting to file his claim seasonably. C purchased

¹ Williams v. Tearney, 8 S. & R. 58.

² Pennock v. Hoover, 5 Rawle, 291.

³ Pennock v. Hoover, 5 Rawle, 291.

⁴ Pennock v. Hoover, 5 Rawle, 291.

⁵ McDonald v. Lindall, 3 Rawle, 492.

⁶ Harker v. Conrad, 12 S. & R. 301.

⁷ Hinchman v. Lybrand, 14 S. & R. 32.

⁸ Pennock v. Hoover, 5 Rawle, 291.

⁹ Werth v. Werth, 2 Rawle, 151.

the former building before the latter was commenced. B files a lien claim against the former building for the whole amount of lumber furnished. Held, B's claim was extinguished *pro tanto* by the note, and could not be enforced for the whole, as against C.¹

40. A statute gives a lien to certain enumerated classes of persons, and also to every one "*employed* in furnishing materials for, or in the erecting or constructing" any building. Held, the word *employed* did not demand, that a claimant should follow the supplying of certain materials as his regular business, but that the act included every one who actually furnished materials for the purpose referred to.²

41. Where land mortgaged is afterwards built upon, the lien of a mechanic, both upon land and buildings, is subject to the claim of the mortgagee.³

42. A building, partly brick and partly frame, having been repaired, was removed, and afterwards a cellar was dug under it and walled up, a new chimney built, and the house newly weather-boarded and plastered. Held, this was a building *erected and constructed* within the meaning of the lien law.⁴*

CHAPTER XLI.

REMAINDER—VESTED AND CONTINGENT REMAINDERS.

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| <p>1. Definition—cannot be after a fee.
 4. By what words created.
 5. Vested or contingent.
 7. When contingent.
 9. Classification of contingent remainders.
 20. Exception to third class—limitation for a long term—remainder after the termination of a life.</p> | <p>24. Limitation after a life, where the term for years is short.
 29. Exceptions to fourth class—Shelley's case—"designatio personarum," &c.
 34. Ch. J. Willes' division of contingent remainders.</p> |
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1. A REMAINDER is a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at

¹ Hopkins v. Conrad, 2 Rawle, 316.

⁴ Savoy v. Jones, Ib. 343.

² Lyle v. Ducomb, 5 Bin. 585. Ashm. 207. 2 Browne, 229 n.

³ Burling, &c. Ashmead, 377. Olympic, &c. 2 Browne, 275.

* From the case of Haswell v. Goodchild, (12 Wend. 373), I infer that there exists a lien law in the State, applicable however only in the city, of New York. I have not been fortunate enough to find the statute, nor do I find any allusion to it in Kent's Commentaries. This is my excuse for omitting an abstract of the statute, if it exists.

one time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it. Thus, if A, being an owner in fee, convey the land to B for ten years, remainder to C and his heirs forever, B is tenant for years, with a remainder to C in fee. Both these estates subsist at one time, and both are parts of one entire estate, making together the absolute and perpetual inheritance of the land. The former is said to be merely carved out of the inheritance. Hence where the fee simple is first conveyed, this being the whole estate, no remainder can be validly limited upon it. Thus, where land is conveyed to A and his heirs, and if he die without heirs, remainder to B in fee, the remainder is void. So, where land was devised to one corporation and its successors, so as they paid a certain annual sum to another and its successors, on failure of which, the estate of the former to cease, and the latter to have it; held, the latter limitation was void.¹

2. The same rule applies to a limitation after a remainder in fee. Thus, where a will, after giving an estate in fee in remainder to children, provided that if their mother survived them it should go to her; held, the children took a vested remainder in fee, and not a contingent remainder.²

3. Upon the same principle, it has been held, that even upon a base or qualified fee, no remainder can be limited, because the entire fee passes, leaving only a possibility of reverter in the grantor. Thus, if lands be given to A and his heirs, so long as B has heirs of his body, or till B returns from Rome, remainder to C in fee; the remainder is void as such, though it might be good as a *shifting use*, or executory limitation. This principle, however, has been doubted. And upon an estate tail, since the statute *de donis*, a remainder may be validly limited.³

4. The estate above described may be created, without the use of the word *remainder*, by any expressions of equivalent meaning; as, for instance, that after the death of A, the land shall *revert and descend* to B, &c.⁴

5. Remainders are either *vested* or *contingent*. The former is when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; or where, if the precedent estate should terminate immediately after its creation, the remainder would then take effect. In other words, a vested remainder is a present interest, though to be enjoyed in future; an immediate right of present enjoyment, or a present fixed right of future enjoyment. And there may be many successive remainders, all of which shall be vested. Thus, if the land be

¹ Co. Lit. 143 a. 4 Kent, 196-7. 1 Abr. Eq. 186. Dyer, 33 a.

² 12 Pick. 64.

³ Co. Lit. 18 a. 10 Rep. 97 b. Vaugh. 269. Flow. 235. 4 Kent, 198-9.

⁴ 2 Cruise, 238.

limited to A for life, remainder to B in tail, remainder to C in fee; B's remainder is vested, because, if A should immediately die, B would take; and C's is vested, because, if A should immediately die, and also B, without heirs, C would take. A vested remainder is in general subject to the same dispositions with an estate in possession. It gives a legal or equitable seisin.¹ But it is said, that in some instances a vested remainder would seem to possess the essential qualities of a contingent estate.²

6. Devise to the wife of the testator during widowhood; and, upon her marriage, one half the estate to go to a son. Another clause devised to the son; upon the death of the widow, *the remaining part* of the testator's landed property. The introductory clause of the will expressed an intent to dispose of all the testator's property. The widow having married, held, the son was entitled to possession of one moiety of the estate, and that he took a vested remainder in the other; that the remainder was subject to execution, and the purchaser entitled to possession upon the death of the widow, notwithstanding the son's death during her life. The son took a vested remainder in the whole estate, because it depended upon a certain event, the death of the widow, who took a life estate by implication, determinable as to a moiety by her marriage. The conditional limitation to the precedent estate, to wit, the second marriage, gave the son possession of a moiety on the happening of that event.³

7. A remainder is contingent, when it is limited to take effect on a condition, which may never happen or be performed, or not till after the determination of the preceding estate.⁴

8. It was remarked, by Lord Chief Justice Willes to the House of Lords, that "the notion of a contingent remainder is a matter of a good deal of nicety; and if I should trouble you with all that is said in the books concerning contingent remainders, and the instances that are put of them, I am afraid it would rather tend to puzzle than enlighten the case."⁵

9. Mr. Fearn divides contingent remainders into four classes.

10. First, where the remainder depends on a contingent determination of the prior estate, by the act either of a third person or of the prior owner himself. Thus, if A convey to the use of B till C returns from Rome, and after such return to remain over to D in fee; here B's estate will end, and D's take effect, only upon a certain event, which may possibly never happen. So, where one conveys to the use of A in tail, until he does such an act; then to B in tail; B has a contingent remainder.⁶

11. Second, the remainder may be limited to take effect only upon

¹ 1 N. Y. Rev. St. 723. Willes, 337. ⁴ Kent, 201. ¹ Prest. on Est. 94-8.

² 4 Kent, 204.

³ Chapin v. Marvin, 12 Wend. 538.

⁴ 2 Cruise, 238.

⁵ Willes, 337.

⁶ Fearn, 5. Arton v. Hare, Poph. 97. Large's case, 3 Leo. 182.

the happening of an event, which is wholly independent of the mode of termination of the prior estate.

12. Thus, if a lease for life be made to A, B and C, and, if B survive C, remainder to B in fee, the remainder does not depend upon the manner of termination of the prior estates, but upon B's survivorship. In other words, the prior estates are subject to no contingency, but must expire by their natural limitation. The contingency is in the remainder only.¹

13. Devise, to the use of A, the heir at law, for life; and from and after his death to the use of B in fee, in case B should survive A, but if she should die living A, to the use of A in fee. B has a contingent remainder.²

14. Third, the remainder may be limited upon an event, which, though it must happen at some time, may not occur till after the termination of the prior estate, in which case, as will be seen hereafter, the remainder becomes void.

15. Conveyance to A for life, and after the death of B, remainder to C in fee. If A should die before B, C's remainder could never take effect. Hence it is contingent.³

16. A testator devised land to his wife, and proceeded to devise "to any child or children of mine which I shall leave at my decease, and to their heirs, and to all the G's (children of his wife) who shall be living at my wife's decease, equally to be divided among them all, the reversion and remainder of said real estate after the death of my wife, in equal portions to each of them and their heirs in common; and if none of the G's be living at the decease of my wife, then the said reversion shall remain to my said child or children and their heirs." The wife survived all her own children, and the son and only child (by a former wife) of the testator, and died. Held, the wife's children had only a contingent remainder, which never vested; and the estate vested in the testator's son, either as devisee or heir, and descended to his heirs, not to the collateral relations of the testator.⁴

17. A testator gave his daughter the income, &c. during the life of her husband; and, if she survive him, to her, her heirs, &c., a moiety of the estate—the other moiety to her children in fee; and if she survive her husband and all her children, to her, her heirs, &c.; and if she should die, living her husband, then to him the income, &c. of a moiety for life; and the residue of the estate to her children in fee. The husband and four children of the daughter were living, at the making of the will, the death of the testator, and at her death. Held, she took a life estate for the joint lives of herself and her husband; that her children took a vested estate in one moiety; that the remainder to them in the other moiety was contingent, depending upon

¹ Co. Lit. 378 a.

² 3 Rep. 20 a.

³ Doe v. Seadamore, 2 B. & P. 289.

⁴ Dixon v. Pickett, 10 Pick. 517.

the event of her dying before or after the husband ; that, if she should survive him, she would take it in fee ; and if he should survive her, he would take a life estate in this moiety, with remainder to her children ; and that, as he did survive her, the children took a vested remainder.¹

18. Fourth, the remainder may be limited to persons not in existence or ascertained at the time of such limitation. Conveyance to A for life, remainder to the right heirs of B, who is living. Inasmuch as *nemo est hæres viventis*, and until B's death it cannot be known who his heirs will be, and he may die before A, the remainder is contingent.

19. Conveyance to A and B for their joint lives, remainder to the heirs of the survivor. Since it is uncertain which of them will survive the other, the remainder is contingent.²

20. An exception to the third class above enumerated, is where the prior estate is for a very long term, and the remainder is limited upon the death of the particular tenant or of a third person. Here, the improbability of such person's outliving the prior estate is so great, that the remainder is held to be not contingent but vested. As the life cannot exceed the term, and the term must determine with the life, the limitation from the expiration of the life is in effect a limitation from the end of the term.³

21. Conveyance to the use of A for ninety-nine years, if he live so long, and after his death, of B in fee. B's remainder is vested.⁴

22. A person covenants to stand seised to the use of himself for life, remainder to A for eighty-nine years, if B, his son, should live so long ; remainder after B's death to C, another son, in tail. C takes a vested remainder.⁵

23. A conveyed to the use of himself for life, remainder to the feoffees for eighty years, if B, and C, his wife, should so long live ; if C survived B, to the use of C for life ; after her death, to the use of the son of C and B in tail ; for default of such issue, to the use of D and E in tail, remainder to A's right heirs. A died, and C died leaving a son, who died without issue. In a suit between D and E and the heir of A, held, the remainder in tail to the first son of C and B, and the remainder to D and E, were vested remainders, the law not regarding the possibility that B and C would outlive the term of eighty years.⁶

24. Where the term is so short that there is a probability of its terminating before the life, the remainder is contingent.

¹ *Blanchard v. Brooks*, 12 Pick. 47.

² *Cro. Car.* 102.

³ 2 *Cruise*, 244.

⁴ *Pollexfen*, 67.

⁵ 2 *Cruise*, 244 ; cites *Lord Derby's case*, *Lit. R.* 370.

⁶ *Napper v. Sanders*, *Hut.* 119.

25. Limitation to A for twenty-one years, if he live so long, after his death to B in fee. The remainder is contingent.¹

26. And, in some cases, the same rule has been adopted where the possibility seemed very remote.

27. Devise to A for sixty years, if he live so long ; from and after his death, to B, his son, in tail. A was forty years old (at the date of the will). Held, this limitation could not be construed to mean from the death of A *during the term*, or to give A a term for sixty years, if he should so long live, and vest the inheritance immediately in B ; but that, if A should outlive the term, which was possible, B could not take, and therefore the remainder was contingent.²

28. To the fourth class of contingent remainders, there are three exceptions.

29. The first arises out of the rule in *Shelley's case*, so called.³

30. The principle settled by that case is, that where a freehold estate is limited to a person, remainder to his heir or the heirs of his body ; instead of his taking a particular estate, with a contingent remainder to his heirs, the whole inheritance vests at once in him. This point, which has been the subject of great discussion, will be more particularly considered hereafter.*

31. Upon a similar principle, where the grantor or deviser of an estate limits the remainder to his own heirs ; instead of a contingent remainder to the heirs, the effect is to leave the reversion in fee in himself.

32. Thus, where one devised his estate to his widow during her widowhood, and after her death or marriage, ordered that it should be distributed in the same manner as if it had not been devised ; held, no valid remainder was created, but the reversion in fee, expectant upon the wife's life estate, descended to the testator's heirs at law.⁴†

33. A third exception is, where the term *heirs* is plainly used as *designatio personæ* ; as, for instance, in case of a limitation to a man and the heirs of his body, *now living*. So, if an estate is devised to a person *and his heirs* during his natural life ; remainder over after his death ; the word *heirs*, if it have any legal effect, is *designatio personæ*, meaning that those who are the heirs apparent shall enjoy *with the devisee* during his life ; and he takes only a life estate. This construction, however, is confined to *devises*.⁵

34. Mr. Fearn's fourfold classification of contingent remainders is simplified to two general classes by Lord Ch. J. Willes ; viz.—1. where the person to whom the remainder is limited is not in esse ; 2. where the commencement of the remainder depends on some matter collateral

¹ Pollexfen, 67.

² *Beverley v. Beverley*, 2 Vern. 131.

³ 1 Co. 104. 2 Rolle's Abr. 417.

⁴ *Whitney v. Whitney*, 14 Mass. 88. (But see 8 Mass. 458).

⁵ 4 Kent, 212. *Throop v. Williams*, 5 Conn. 98.

* See *Shelley's case—Devise, Devisee*.

† See *Reversion*.

to the determination of the particular estate. His Lordship's language is, however, that there are but two sorts of contingent remainders *which do not vest*. This would hardly imply that he supposed there were any other contingent remainders which do vest, were it not for some expressions in a subsequent part of the same opinion; where, putting the case of the grant of an estate by A to B for ninety-nine years, determinable in B's life; he says, if B outlive the term, surrender, &c., A may enjoy the estate again—therefore, he has a *contingent freehold* during B's life. It must be a *vested interest*, for it was never out of him. If A had a *contingent freehold*, he might grant it over; and if he do, it must be of the same nature it was before—a *vested freehold*. In these remarks, the words *vested* and *contingent* seem to be used not as contradictory, but synonymous, or at least consistent terms.¹

CHAPTER XLII.

REMAINDER—VESTED AND CONTINGENT REMAINDERS.

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| <ol style="list-style-type: none"> 1. Contingency of remainder depends on <i>present</i> capacity of taking effect. 2. Law favors vested remainders. 4. Remainder may be vested, though not to take effect upon every possible termination of prior estate. 7. Intervention of contingent estate—remainder not thereby contingent, unless the estate is a fee. 11. Contingent estates may be <i>devised</i>, as substitutes for each other. 17. Cross remainders. 18. Prior limitation to trustees and their heirs till a certain event. 20. Where one of concurrent remainders, &c. vests—rest defeated. | <ol style="list-style-type: none"> 21. Successive remainders—whether the contingency named affects only one or the whole. 22. Limitation after an estate depending on a contingency which never happens. 28. After the conditional termination of an estate; which never takes effect. 30. After the conditional termination of an estate which takes effect, but terminates otherwise. 31. Words importing not a contingent remainder, but when a remainder shall come into possession. 45. Remainder upon condition <i>subsequent</i>. |
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1. From the preceding remarks it sufficiently appears, that the question whether a remainder is vested or contingent, does not depend upon the certainty or uncertainty of its ever taking effect in possession; but upon its present capacity of thus taking effect, if the possession

¹ *Smith v. Parkhurst*, 3 Atk. 138. *Willes*, 337-9. *Throop v. Williams*, 5 Conn. 99. 1 N. Y. Rev. St. 723. 1 Wooddeson, 191.

were to become vacant.* Thus, if there be a lease for life to A, remainder for life to B, B's remainder is vested, although he may die before A. But if there be a lease for life to A, remainder for life to B after the death of C, inasmuch as B's estate would not necessarily vest upon the present determination of A's estate, the remainder is contingent. The latter illustration, however, shows how a remainder contingent in its creation may become vested; for, upon the death of C, B's remainder undergoes this change, because, from that time, if at any moment A's estate should cease, B's would immediately take effect. Hence also it appears, that a contingent remainder passes through two stages before it becomes an estate in possession. Thus, in the case supposed, upon the death of C, living A, B's contingent remainder becomes a vested remainder; and then, upon the death of A, the vested remainder becomes a vested estate.¹

2. These observations lead naturally to a consideration of the more minute distinctions between vested and contingent remainders. It may be remarked at the outset, that, in England, as the Court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the fee in abeyance; so neither does it construe a remainder to be contingent, where it can be taken for vested, because the latter tends to *support* the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by fine or feoffment.²

3. Whenever the preceding estate is limited so as to determine on an event which certainly must happen, and the remainder is so limited to a person in esse, and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder, such remainder is vested. But whenever the preceding estate, with the exceptions above named,† is limited so as to determine only on an event which is uncertain, and may never happen; or to a person not in esse or not ascertained; or so as to require the concurrence of some uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect; the remainder is contingent.³

4. The definition given above of a vested remainder, does not require that it should be so limited as to take effect upon every possible determination of the particular estate. It seems to be sufficient, that the preceding estate is made to determine upon an event which certainly must happen, although it may determine upon other events which may not happen, and although it is only upon a determination

¹ Fearn, 329-331. Wille, 337.

² Wilkes v. Lion, 2 Cow. 333. 3 T. R. 489 n.

³ Fearn, 329. 12 Wend. 538.

* It has been said, that, in some cases, even without this capacity, a remainder may be vested. The true principle would therefore seem to be, that, *with this quality*, a remainder *must* be vested, and *may* be vested without it. Cornish, 102.

† See ch. 40.

in the latter mode, that the remainder will take effect. Thus, if an estate be limited to A for life, remainder to B for the life of A, inasmuch as the death of A is a certain event, and, if A's estate should terminate by forfeiture or surrender, the remainder would take effect; it is a vested remainder.¹

5. Conveyance to the use of A for ninety-nine years, if he should so long live; from and after his death, *or other sooner determination of the estate limited to him for ninety-nine years*, to the use of trustees and their heirs during A's life, to preserve contingent remainders; and *after the end or other sooner determination of the said term*, to the use of A's sons in tail, remainder over. Held, first in the King's Bench, and afterwards in the House of Lords, that the estate of the trustees was a vested, not a contingent remainder, because the trustees were persons in esse at the time, and the commencement of the remainder did not depend on any matter collateral to the determination of the particular estate. Lord Ch. J. Willes remarked, that upon any other construction, in case of the death of the trustees during A's life, no estate would vest in their heirs, which would prove the universal practice of inserting the word *heirs* in such settlements, to be wholly useless and unmeaning, and that many thousand settlements would be overturned; in preference to which he would adopt precedent for law, and follow the maxim "*communis error facit jus*." That if a limitation were made to A for ninety-nine years, determinable on his life, with no remainder, the grantor would retain a vested reversionary interest, which would take effect upon the expiration, forfeiture or surrender of the term, and this interest he might grant over, and thereby create a vested remainder in the grantee.²

6. The limitation in this case seems to have been most inartificially worded. The words "from and after A's death," were admitted on both sides to be wholly senseless, being immediately followed by "during A's life." Moreover, the limitations to the trustees and to A's sons, though successive, were to take effect, it would seem, upon precisely the same contingency, the termination of the term for years.

7. Where a contingent limitation intervenes between the particular estate and a remainder to a person in esse, the latter may be vested, provided the intervening limitation be not in fee. So where neither remainder-man is in esse at the time, but the latter is born before any one in whom the former estate can vest.³

8. Limitation to A for life, remainder to his first and other sons in tail, remainder to B and his sons in the same way. B has a son born, but A has none. B's son takes a vested remainder, subject to be defeated by the birth of a son to A. The last limitation is said to be

¹ Fearne, 279-86. 4 Kent, 202. 2 Co. 51 a.

² Berrington v. Parkhurst, 3 Atk. 135. Willes, 327-39. 6 Bro. Parl. Ca. 352.

³ Fearne, 222.

executed *sub modo*, so as to open and separate itself from the particular estate, whenever the contingency happens.¹

9. Where the intervening estate is contingent for some other cause than that the party to whom it is limited is not in esse, if the contingency does not extend also to a subsequent remainder, this may be vested.²

10. But where the prior limitation is in fee, no subsequent remainder can be vested.³

11. Although a remainder cannot be limited after a fee, yet it may be created, to vest in the event of the first estate's never taking effect: or several estates in fee may be limited contingently as substitutes for each other; some to take effect on failure of the others, and in their room. Such remainders are said to be not expectant, but contemporary; the latter not contrary to, but concurrent with the former. It is not a fee mounted upon a fee, but a contingent remainder with a double aspect, or on a double contingency. The limitation is not good as a remainder, if it is to *succeed*, instead of being *collateral* to, the contingent fee. Thus, in a limitation to A for life, remainder to his issue in fee, and, in default of such issue, remainder to B, the remainder to B is good, being collateral to the contingent fee in the issue. But, if the remainder to B is limited upon the event of the issue's *dying under age*, though it may be good as an executory devise or shifting use, it is void as a remainder, being dependent on an event, which rescinds a prior vested fee.⁴

12. Devise to A for life, and if he should have any issue male, to such issue and his heirs forever; and if he should die without issue male, then a part of the lands to B in fee, and a part to C in fee. Held, all these several limitations in remainder created contingent remainders in fee. If A should have issue male, the fee would vest in him; if not, then it would vest in B and C.⁵

13. Devise to A for life, and, after his death, to his children equally, and their heirs; and in case he dies without issue, to B and C and their heirs, equally, &c. Held, the two last limitations were both contingent remainders in fee.⁶ So, where there was a devise to A for life, remainder to trustees, &c., remainder to all the children of A, begotten or to be begotten by B, and their heirs forever, &c., remainder over; held, according to the clear intent, the children of A took a fee; but, for want of such children, the subsequent limitation would have taken effect.⁷

14. A devised to his daughter B, for her life; then to *her male heir*, C, if alive at her death, in fee; otherwise, to her next male heir in

¹ Uvedall v. Uvedall, 2 Rolle Abr. 119. Bowles' case, 11 Rep. 80.

² Napper v. Sanders, Hut. 119.

³ 1 Ld. Raym. 208. 12 Pick. 64.

⁴ 1 Ld. Raym. 203. Doug. 505 n. 4 Kent, 199-201.

⁵ Luddington v. Kyme, 1 Ld. Raym. 203. Barnardiston v. Carter, 3 Bro. Parl. Ca. 64. (See 12 Pick. 65).

⁶ Goodright v. Dunham, Doug. 265.

⁷ Doe v. Peppyn, 3 T. R. 484.

fee. Held, that B did not take an estate tail; that nothing vested in C during the life of B, because he was to take only if he should be living at her death, and therefore, till her death, the fee vested nowhere; that the estate to C was contingent, notwithstanding his being designated by name; that the fee simple, which was to vest upon the death of B, was not an executory devise, but a contingent remainder, having a preceding freehold to support it; that it was not a limitation of a fee after a fee, but a limitation of only one indefeasible estate in fee; that the will presented a *contingency with a double aspect*, to be determined immediately on the death of B, at which time an indefeasible estate would vest, either in C, or in the next heir male of B, as the case might be. In this case, Gibson J. thus states the general rules of law pertaining to the subject. Where, of two limitations (in fee) both are to take effect; the latter can do so only as an *executory devise*, for a remainder, originally contingent, but afterwards vested by the happening of the contingency, is essentially the same as if it had been vested at its origin; but, where both are limited alternately on the same event, by the happening of which, one is to vest in exclusion of the other, there both are contingent remainders.¹

15. Where the language used may be construed to create either successive and alternative contingent estates in fee, or a contingent preceding estate less than a fee, and a vested remainder in fee, the latter construction will be adopted, as the more accordant with the general policy of the law.

16. Devise to A, the testator's daughter, for life; then to the children of her body begotten, and their heirs; *in default thereof*, to the testator's son, B, his heirs and assigns. B died living A, having devised his interest, and then A died without children. The question was, whether B took a vested remainder, which could be devised, or only a contingent remainder. Held, he took a vested remainder. The clause, *in default thereof*, was equally applicable to the failure of A's children and of their heirs. If there had been no limitation over, or a limitation to other parties, the devise would have made a contingent fee simple to the children of A. But, the subsequent remainder being limited to a collateral heir of the children, they must take an estate tail, with a vested remainder to B. Had the devise in question applied to the failure of A's children only, and not that of their heirs, then there would have been two contingent fees simple, the one to take effect only on failure of or as a substitute for the other. But the law would not adopt this construction, except where the language absolutely required it.²

17. *Cross-Remainders* are another qualification of expectant estates, and they may be raised expressly by deed, and by implication in a

¹ *Dunwoodie v. Reed*, 3 Ser. & R. 435-452. *Den v. Crawford*, 3 Halst. 90.

² *Ives v. Legge*, 3 T. R. 498 n. (See *Blanchard v. Brooks*, 12 Pick. 63).

devise. Thus, if a devise be made of one lot to A, and another lot to B, in fee, and, if either dies without issue, the survivor to take, and, if both die without issue, to C in fee; A and B have cross-remainders over by express terms, and, on the failure of either, the other, or his issue, takes, and the remainder to C is postponed. But if the devise had been, to A and B, of lots to each, remainder over on the death of both of them, the cross-remainders to them would be implied. So, if different parcels of land are conveyed to several persons by deed, and by the limitation they are to have the parcel of each other when their respective interests shall determine, they take by cross-remainders. This subject will be more particularly considered hereafter.¹*

18. Where the preceding contingent remainder is limited not in fee generally, but to trustees and their heirs, until the happening of a certain event, the subsequent remainders may be not contingent but vested.

19. Devise to A for life, and, if she die without issue of her body living at her death, to trustees and their heirs till B should be twenty-one years old. After which, devise to B for life, remainder to his sons in tail male. In default of such issue, or if B should die under twenty-one, and without issue, to C, &c., persons in esse. Held, the limitation to the trustees would take effect only upon A's dying without issue, and in this event would be not an absolute but a determinable fee; that B's estate was contingent only till he should come of age; and, in the mean time, the subsequent remainders were vested.²

20. In case of concurrent remainders, or where a preceding contingent remainder is in fee; if, in the one case, one of such remainders, or, in the other, such preceding remainder, becomes vested, the other remainders thereby become void. Thus, where there is a devise to A for life, remainder to his issue male, in default thereof remainder over; upon the birth of such issue, the first remainder becomes vested, and the latter thereby void, even though the issue die before A himself.³

21. Where there is a limitation of several successive remainders, the first of which is made to depend upon a certain contingency, the important question arises, whether this contingency applies only to the first remainder, or to all the succeeding ones also. Cases of this kind are divided into three classes. 1. Limitations after an estate which depends on a contingency that never happens. 2. Limitations upon a conditional termination of an estate which never vests. 3. Limitations upon a conditional termination of an estate, which, though the estate vests, never happens.

22. In the case of *Lethieullier v. Tracy*, cited above, (s. 19), it was

¹ 4 Kent, 201.

² *Lethieullier v. Tracy*, 3 Atk. 774. Amb. 204.

³ *Keene v. Dickson*, 3 T. R. 495.

* See *Deed. Devise. Cross-Remainder*.

held, that neither the condition of A's dying without issue, nor the condition of B's coming of age, affected the remote subsequent limitations, which accordingly were vested remainders.

23. Devise, to the use of A for life, remainder to his first and other sons by any future wife in tail male, &c.; and, if A should marry any woman related to his then wife, all the above uses, so far as they related to the issue of A, to cease and be void; and, *in such case*, though A have issue, the trustees to stand seised to the use of C, &c. A died soon after the testator, not having again married, and without issue. Held, the remainder to C took effect, not being defeated by the want of such second marriage.¹

24. Devise to trustees, to pay over the rents and profits to A and B, during the life of C, (A, B and C, being sisters of the testator) their heirs and assigns; and, after the decease of C's husband, in trust for A, B and C, each a third part, for life; remainders to their sons in tail male, &c., cross-remainders over. C died, living her husband. The question was, whether by C's death, not only her own estate, but the subsequent remainders also, were defeated. Held, the latter were not defeated.²

25. A different rule is adopted, where the intention of the testator seems so to require, or where the Court cannot find upon the whole will sufficient to gather a different intent, so as to warrant them in supplying omitted words.³

26. Devise to A, the testator's son, and the heirs of his body; and if A should die without issue, *and the testator's wife B should survive A*, that she should enjoy the premises for her life; after her decease to C for life; after her decease (*A being dead without issue as aforesaid*), to D. B died in the life of A. Held, the remainder of D was defeated, being contingent upon A's dying without issue in the life-time of B.⁴

27. Devise to trustees, in trust to pay a certain sum to A for life, and the rest of the rents to B her husband; and after her death, the whole to him for life. If *she should happen to survive her husband*, then to stand seised of all the lands *upon the trusts after mentioned*, viz. to A for life, then to her son and the heirs of his body, remainder to the heirs of the body of the husband by her, remainder over. A died before B. Held, not only A's life estate, but all the subsequent remainders, were defeated.⁵

28. The second class of cases, is where a remainder is limited upon the conditional determination of a preceding estate, which never takes effect. And here, whether the preceding estate is in fee or otherwise, it is said, that by whatever means it is out of the case, the subsequent limitation will take effect.⁶

¹ *Bradford v. Foley*, Doug. 53.

² *Horton v. Whitaker*, 1 T. R. 346.

³ Doug. 78-9.

⁴ *Davis v. Norton*, 2 P. Wms. 390.

⁵ *Doe v. Shippard*, Doug. 75. *Fearne*, 236.

⁶ 1 Ves. 422.

29. Devise to trustees for years, remainder to the sons of A successively in tail male, provided they should take the testator's surname. If they or their heirs should refuse so to do, or die without issue, to the first son of B in tail male on the same condition. B had a son at the time of the devise. A died without having had a son. Held, whether the contingent limitation to persons not in esse, having only a term to support it, were void or valid ; such limitation was not a condition precedent of the subsequent remainder, and that the son of B took a vested remainder.¹

30. The third case, is where the remainder is limited upon a contingent determination of the preceding estate, which actually takes effect, but does not terminate in the mode pointed out. In this case, the remainder shall not take effect, unless the general intent of the testator so require.²

31. Words of limitation are often used, which, though seeming to import a contingent remainder, the law construes merely as fixing the time, when a vested remainder shall become an estate in possession. This construction is adopted, where an absolute property is given, and a particular interest in the mean time ; as, *until the devisee shall come of age, then to him, &c.* And a remainder will always be construed as vested, where the words admit of it.³

32. Devise to A for eight years, remainder to executors till such time as B shall be of age ; and *when* B shall be of age, that he shall enjoy the same in fee. Held, this was a vested remainder in B ; that the legal construction was, a devise to executors till B reached twenty-one years, remainder to B in fee, and the remainder was no more contingent, than in the common case of a lease for life or for years, remainder over ; that, inasmuch as the term must certainly end, the adverb *when* created no contingency, but merely denoted the time when B should have possession.⁴

33. Devise to A, till B reaches the age of twenty-one years ; when B reaches that age, to him and his heirs. B dies under age. Held, a vested remainder.⁵

34. Conveyance to the use of A for life, then to the first son of his body and his heirs male, and to four sons successively in tail ; and *if it fortune* the said fourth son to die without issue male, then to remain to B. A died without issue male. Held, B's estate vested, the circumstance of A's having issue not being a condition precedent.⁶

35. Devise to A for life, then to B ; and, if my three daughters, or either of them, overlive A and B, and his heirs, then they to have it ;

¹ Scatterwood v. Edge, 1 Salk. 229. 1 Ves. 422.

² Fearne, 362.

³ 4 Kent, 204. 3 M. & S. 32. 1 Burr. 228. 8 Rep. 95 b.

⁴ Boraston's case, 3 Rep. 19. Fearne, 368.

⁵ Mansfield v. Dugard, 1 Abr. Eq. 195.

⁶ Holcroft's case, Moore, 486.

and after them to C. B and two of the daughters died, living A. Held, this was not a contingent limitation, but only a designation of the time, when a vested remainder should become an estate in possession.¹

36. Devise to the testator's wife for life, "to be for her own comfort, &c. while she remains my widow, without any disturbance, &c. from any of my children; and, in case she alters her condition by marriage, then my said estate I will shall be divided as the law directs." Held, the testator's children took a vested remainder at his death.²

37. Devise to four children of the testator of four several estates, to each, one estate, and when either of them shall die, the said estates to be equally divided among them that are living. The eldest son and heir died. Held, the remainder to the other children, in the estate given for life to this son, was not contingent but vested, and therefore was not void, in consequence of a merger of the son's life estate in the inheritance which descended to him.³

38. Devise to trustees in trust, to apply the proceeds to the support and education of children during minority; and when and as they should come of age, to the use and behoof of them and their heirs. Held, the children took an immediate gift, with a trust interest during minority.⁴

39. Devise to the wife of the testator, of the use and improvement of one third part of his estate for life; "and I give and devise the same at her decease to my children" in fee. Held, the children took a vested remainder.⁵

40. Devise to the testator's three illegitimate sons, "if they should live to come of age." Held, whether the sons took a vested remainder, to become a vested estate afterwards, or only a contingent remainder; they had no estate in possession till they came of age, and intermediately the land descended to the heir at law.⁶

41. Devise of certain specified lands to the use of the testator's wife for life, and of all the testator's lands to A in fee; but, if he shall not live to be of age, then in like manner to his surviving brother, C; but if C shall die before of age, then, &c. to his surviving brother, D; but if D should die, &c. then to the first surviving lawful son of E, in fee; for default of such issue, remainder to the testator's own right heirs forever. If the wife shall die before A, or before his survivor is of age to take possession, then E to have the use and benefit of the lands, till the testator's heir shall be of age to take possession. The wife and E both died before A came of age. Held, upon the death of the widow, the estate did not descend to the heirs at law, until A came of age, but immediately vested in him; that, as the devise to E

¹ Webb v. Hearing, Cro. Jac. 416.

² Bates v. Webb, 8 Mass. 458.

³ Fortescue v. Abbot, Pollexfen, 479.

T. Jones, 79. 2 Ventr. 365.

⁴ Goodtitle v. Whitby, 1 Burr. 228.

⁵ Naah v. Cutler, 16 Pick. 491.

⁶ Jackson v. Winne, 7 Wend. 47.

of the use of the land after the widow's death, till A should come of age, failed by the death of E, it should be considered as out of the case; and that the object of this devise to E (who was the mother of A), was not to benefit her, but to enable her to take the profits of the land during A's minority.¹

42. Devise substantially as follows—"all my debts to be paid from my personal estate, the remainder I give to my wife for the support of her and my minor children during her widowhood, and the estate to remain undivided till my youngest child shall come of age. But if my wife should be still living and my widow, she shall have the whole income of my estate, keeping it in repair, &c., but if she marry, she shall have £30 per annum from my estate for her life. And it is my will, that all my children shall have an equal share of the whole of my estate that I now possess, or may possess at my death, at the time before mentioned for division; and should any of them die without heir lawfully begotten, their share shall be equally divided amongst the surviving children." Held, the estate devised to the children did not remain contingent till the death of the widow, or the coming of age of the youngest child; but, immediately upon the testator's death, they took a *vested remainder*, though not to *take effect in possession* till the happening of the last of the events referred to.²

43. Where there is a devise to trustees *and their heirs* during the minority of A, then to him in fee, or upon trust to convey to him; inasmuch as A takes a vested remainder, to vest in possession upon his coming of age, the trustees have been held, notwithstanding the words of inheritance, to take only an estate for so many years as the minority of A shall last. But this doctrine has been questioned, as an anomaly in the law; and held wholly inapplicable to limitations by deed.³

44. Upon the above named principle, where land is given to one for life, or any other estate upon which a remainder may be limited, and after the determination of that estate to a person sustaining a given character, as *heir at law*, *heir male*, or *next of kin*, of the testator, or of another; the remainder will vest in the person or persons who fill that character *at the death of the testator*, and not remain contingent till the *termination of the prior estate*, unless there is a clear intention to the contrary.⁴ But it is said, that the construction by which a limitation, to take effect in futuro, is construed as a vested, and not a contingent remainder, cannot be adopted, unless there is an intermediate disposition of the estate, or the rents and profits, or a direction that it shall

¹ Jackson v. Durland, 2 John. Cas. 314.

² Tatem v. Tatem, 1 Miles, 309.

³ Stanley v. Stanley, 16 Ves. 491. Doe v. Nicholls, 1 Barn. & Cr. 336. Cornish, 105-7. 3 T. R. 41.

⁴ Doe v. Spratt, 5 Barn. & Adol. 739.

go over, upon the party's dying before the specified time. Otherwise, the limitation must take effect, if at all, as an executory devise.¹ *

45. A remainder is sometimes contingent upon a *condition subsequent*, which operates to defeat it after being vested, instead of a condition precedent, the performance of which is necessary to its vesting. But it is said, a remainder cannot be thus divested, unless there are words in the will capable of producing this effect, and showing such intention. Of this nature, is a limitation subject to a *power of appointment*. Thus, if an estate be limited to A for life, remainder to such use as A shall appoint, and in default of appointment, remainder to B; B's remainder is vested, but subject to be defeated by execution of the power.²

46. Limitation to the use of A for life; after his death, of B in fee, if B should live to be of age; provided and on condition, that if B should die under age, remainder over. Held, the remainder vested in B, subject to be divested by his dying under age.³

47. Devise to A for life, and on his death, to and amongst his children, equally, at the age of twenty-one, and their heirs, but if only one child shall live to be of age, to him and his heirs at the age of twenty-one. And if A die without issue, or such issue die before twenty-one, devise over. Held, A's children took a vested remainder.⁴

48. Devise of land to A for the purpose of building a schoolhouse, provided it should be built in a certain place; and of the residue of the testator's property to B. A took possession, but after B's death, forfeited by breach of condition. Held, B had a contingent interest, which passed to her heirs.⁵

49. Upon the same principle, a remainder once vested may be defeated only *in part* by the happening of a subsequent event. Thus, where there is a devise to A for life, remainder to his children; the children of A, living at the death of the testator, take vested remainders, subject to be disturbed by after-born children, for whose benefit the estate will open, and let them in to take their proportional shares.⁶

50. Devise of all the remainder of my estate to my daughter, A, and the children born of her body, including all my wife has the improvement of, during her life, after her decease. A had three children when the will was made, and a fourth was born afterwards, all of whom survived the testator, and two more were born after his death.

¹ 4 Kent, 205.

² *Driver v. Frank*, 6 Price, 73-5. *Packard v. Packard*, 16 Pick. 191. 4 Kent, 204.

³ *Edwards v. Hammond*, 1 Bos. & Pul. N. R. 313.

⁴ *Doe v. Nowell*, 1 M. & S. 327. *Randall v. Doe*, 5 Dow. 202.

⁵ *Clapp v. Stoughton*, 10 Pick. 463.

⁶ *Fearne*, 394-6. 3 T. R. 484. 5 Mass. 535; 14, 404. 1 Pick. 147.

* In the case of *Doe v. Lea* (3 T. R. 41), a distinction was made, in reference to the point above considered, between the expressions "when and so soon as," and the word "if," which, in *Brownsoords v. Edwards*, (2 Ves. 243), was held to create a condition precedent. But this distinction seems to have been disregarded in several subsequent decisions.

Held, the children of A living at the testator's death, took a vested remainder in that portion of the estate devised to A for life, which, upon the birth of the other children, opened and let in their shares.¹

51. Devise to A for life, and immediately after her death unto and among all and every such child and children, as she shall have lawfully begotten at the time of her death, in fee simple, &c. Held, a vested remainder was hereby given to every child of A, subject to be in part divested by the birth of subsequent children; and that, upon the death of a child during A's life, his interest descended to his heirs. The decision was founded, in part at least, upon the presumed intentions of the testator in favor of his grandchildren. Spencer J. dissented.²

52. A devised to B for life, and after her death to C, to have the improvement to her and her heirs during her natural life; and declared, that after C's death, D, her son, should be sole heir of the estate. D died about a month after the testator, leaving a sister, E; and four years after his death, two other sisters, F and G, were born. Held, D took a vested remainder in fee, to take effect upon the termination of two preceding life-interests; that on D's death his title passed to E; and that after the birth of F and G, they took as joint heirs with her under the devise.³

53. The same principle has been applied even in case of a deed. A, in consideration of a sum of money and of natural love, conveyed to B, and C, his wife, the daughter of A, and to the children and heirs of C and their heirs, &c. habendum to B and C, and to the children and heirs of C, for the proper use, &c. of B and C, for their joint lives and that of the survivor, and immediately from the decease of such survivor, to and for the use, &c. of the children and heirs of the body of C, in fee, as tenants in common, &c. C had three children at the execution of the deed; and subsequently several children and grandchildren were born. Held, a remainder vested in the three children, and, upon the birth of the others, opened and admitted them to their shares; and that the share of any child, who died living B or C, vested in the issue of such child.⁴

54. So where an estate is limited by deed of uses, to parents during their lives, and then to the use and behoof of such child or children as may be procreated between them, and to his, her, and their heirs and assigns forever; there is a remainder in fee to the children, which ceases to be contingent upon the birth of the first, and opens to let in the after-born children. The general rule of law, founded on public policy, is, that limitations of this nature shall be construed to be vested when and as soon as they may.⁵

¹ Annable v. Patch, 3 Pick. 360.

² Throop v. Williams, 5 Conn. 98.

³ Carver v. Jackson, 4 Pet. 90-1-2.

⁴ Doe v. Provoost, 4 John. 61.

⁵ Wager v. Wager, 1 S. & R. 374.

55. Devise to trustees, in trust to permit A to receive the rents for life; and after her death, devise "to the heirs of the body of A, share and share alike," in fee. At the testator's death, A had one child, and others were born afterwards. Held, by the "heirs of the body" was meant *children*, and that the first child took a vested remainder in fee, which, upon the birth of the others, opened and let them in.¹

56. Devise to A for life, remainder to the "second, third, fourth, and all and every other the sons of A, (*except the first or eldest son*) successively in tail male," remainder over. At the testator's death, A had no children. Held, the remainder was contingent, till A had two sons, both living, and then became vested, and not subject to be divested by subsequent changes in the family of A.²

57. It follows from the doctrine above laid down, that where the particular estate terminates, before the time within which the condition may happen that is to defeat the remainder, the remainder shall still become a vested estate, liable to be defeated by the happening of the condition.

58. Devise to A for life, after his death to B, if he live to be of age. A dies, living B. B takes a vested estate, determinable on his dying under age.³

59. As a remainder will not be construed to be contingent, where it can be construed as vested; so a vested remainder will not be divested, without a special provision, or a clear intention, to that effect.⁴ It has been said, however, that the principle of favoring vested estates is an entirely *technical* rule.⁵

¹ *Right v. Creber*, 5 Barn. & Cress. 866.

² *Driver v. Frank*, 6 Price, 41.

³ *Bromfield v. Crowder*, 1 B. & P. N. R. 313-4. (*Doe v. Moore*, 14 E. 601).

⁴ *Doe v. Perryn*, 3 T. R. 494. *Driver v. Frank*, 3 M. & S. 26.

⁵ 6 Price, 73.

CHAPTER XLIII.

REMAINDER—VOID CONDITIONS.

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|---|--|
| 2. Illegality. | 16. Exception—enlargement of prior estate. |
| 4. Remoteness, of probability. | 19. Devise—conditional limitation. |
| 7. Abridgment, &c. of preceding estate. | 23. Limitation by way of use. |
| 14. Or of preceding remainder. | |

1. THERE are several circumstances, pertaining to the condition upon which a contingent remainder is limited, that will render such limitation void.

2. The contingency must be a *lawful act*. The law will never adjudge a grant good, by reason of a possibility or expectation of a thing which is against law; for it is "*potentia remotissima et vana*," which, by intendment of law, "*nunquam venit in actum*," besides being against public policy.¹

3. Hence a limitation to a bastard is void. So a limitation to the children, legitimate or illegitimate, of A by the grantor.²

4. The contingency must be not a *remote*, but a *near* or *common* possibility. And the ordinary legal distinction between these two kinds of possibility, is that the latter is single and depends on only one uncertain event, while the latter is double, depending on more than one, which are not independent, but the one requiring the previous existence of the other, and yet not necessarily arising out of it.³

5. Thus, a limitation to the heirs of A, there being at the time no such person as A, is void, though A should be born and die during the particular estate; because there is first the contingency, whether there would be any such person; and second, whether he would die during the continuance of the prior estate.⁴

6. A limitation, during the vacation of a mayoralty, to A for life, remainder to the mayor and commonalty in fee, is good; but a limitation to a corporation not in existence at the time, though afterwards created, is void. So a limitation to the right heirs or the first born son of A, not naming them, is good; but a limitation to B, the first born son of A, is void, because there is first the contingency of A's having a son, and second, of his being named B, which is a possibility upon a possibility.⁵

¹ 2 Rep. 51 b.

² *Blodwell v. Edwards*, Cro. Eliz. 509.

³ Co. Lit. 25 b, 184 a. 2 Rep. 51 a. *Fearne*, 378.

⁴ *Cholmeley's case*, 2 Rep. 51 b.

⁵ Co. Lit. 264 a. 2 Rep. 51 a, b. *Fearne*, 378.

7. A remainder cannot be validly limited upon an event, which will operate to abridge, defeat or determine the preceding estate; but must be so limited, as to take effect only upon the natural expiration of such estate. This rule is founded on the principle heretofore stated, that the benefit of a condition can be reserved only to the grantor or his heirs, who shall take advantage of any breach by entry. The effect of such entry is to revest the estate, avoiding not only the particular estate, but also the remainder limited upon it.¹

8. Conveyance to A for life, on condition that if B pay the grantor a certain sum, then the land shall immediately remain to him. The remainder is void.²

9. Conveyance to A and B, remainder over, after the death of A, to C in fee. This remainder is void, because repugnant to the rights of B as survivor of A, by virtue of the first limitation.³

10. Conveyance to A, a widow, for life, remainder to B in fee, on condition that A continues a widow. This remainder is void, because an entry, upon A's marrying, to defeat her estate, would defeat the remainder also. But a grant to A *during widowhood*, remainder to B upon A's marriage, makes a *limitation*, which will take effect by its own operation without entry, and therefore the remainder is good.⁴

11. Where the words used may be construed to change a contingent remainder into a vested remainder, instead of converting a vested remainder into a vested estate, and thereby defeating a prior limitation; this construction will be given.

12. Limitations to A for life, remainder to B for life; if B die, living A, the lands to remain to C. Held, the last limitation was valid, having no effect to abridge A's estate.⁵

13. It is to be observed, also, that there is a distinction between conditions which operate to abridge or defeat a prior vested estate, and those which merely provide in what manner estates shall go over, which, *by virtue of the prior limitation* itself, are made dependent upon a condition. Thus, that if land be limited to A for twenty-one years, *if B shall so long live*, and, in case of B's death during the term, to C in fee; this is a good remainder; for the condition does not abridge an *absolute* estate for years once vested, but a contingency is annexed to the estate for years itself. It must be admitted, however, that the dividing line between conditions always admitted to be valid, and those which are said to be void, as abridging the prior estate, is extremely nice. The following remarks of Mr. Douglas, in a note to the case of *Goodtitle v. Billington*,⁶ throw some light upon the subject. He remarks, that a limitation does not cease to be a remainder, because it may vest in posses-

¹ 1 Cruise, 276. 4 Kent, 249. pp. 249-263.

² Plow. 24.

³ Hardy v. Seyer, Cro. Eliz. 414. Fearn, 363.

⁴ Colthirst v. Bejushin, Plow. 23.

⁵ Plow. 29. 2 Leon. 16.

⁶ Doug. 755.

sion on an event, which, from *the terms* or from *the legal nature of the original limitation*, shall defeat the particular estate before its *natural or regular* expiration. Every remainder, limited after an estate for life, may vest in possession before the death of the tenant for life, which is the term of the natural expiration of the particular estate; namely, in consequence of any forfeiture which he may commit. Some have been inclined to consider conditional limitations after particular estates, as, for instance, after an estate for life, but limited to vest in possession on a contingency which may happen before the death of tenant for life, as not being remainders, (Ferne, 9, 10). Thus, if an estate is given to A for life, provided that when C returns from Rome, it shall thenceforth be to the use of B in fee, it is said, this limitation over is not confined to the remnant, expectant on the particular estate before given to A, but may interfere with and in part defeat and supersede that first estate, instead of awaiting its regular determination; and therefore it does not answer the definition of a remainder in Co. Lit. 143 a. But this seems too great a refinement. Every estate for life may, by the act of the tenant, be defeated and abridged, before its regular expiration, and thereby let in the remainder over in the manner above stated; and the only difference between such limitations and the others is, that in the others, the estate for life is not abridged by the act of the tenant for life, but by some extrinsic event, which happens also to be the contingency on which the limitation over depends. What difference, more than what is merely verbal, can there be shown to be, between *an estate to A till B returns from Rome, then to remain over to C*; and *an estate to A*, provided that, when C returns from Rome, it shall thenceforth be to B. Under both forms of expression, A takes an estate for life, defeasible on the very same event. And Mr. Ferne himself adduces the former, as an example of contingent remainder. Nor can it make any difference, whether the prior estate is limited generally, or expressly for life; because, in the former case, a life estate is *implied*.

14. A condition, the effect of which is to defeat or abridge one vested remainder, and substitute another for it, is void.

15. A conveys to B for life, remainder to C for life, provided that if A should have a son who should reach a certain age, then C's estate should cease, and the land remain to such son. The latter remainder is void.¹

16. It has been said, that the rule above stated does not apply to the case, where, although, in terms, the condition on which the remainder shall take effect, will abridge the particular preceding estate, yet in effect it will merely operate to *enlarge* such estate; in other words, where the remainder-man and the particular tenant are one and the same person. In such case, no injury arises to the preceding

¹ Cogan v. Cogan, Cro. Eliz. 360.

tenant, and no entry on the part of the grantor or his heirs is necessary to defeat the preceding estate, at the same time defeating the remainder also. The operation is the same, as if the remainder were limited to take effect, upon the determination of the prior estate by its own limitation. Thus, if a conveyance be made to A and B, remainder in fee to the survivor, this remainder is valid.¹

17. In illustration of this exception to the general rule, the case of *Goodtitle v. Billington*² is cited. This was a devise to the testator's wife, A, and his daughter, B, for their lives, and the life of the survivor, in equal proportions—but if B marry and have lawful issue, then, after the death of A, to B in fee. But if B die unmarried, and without lawful issue, to A in fee. A and B both survived the testator, and B survived A, but was never married. It was contended, that the limitation to B, in case she should marry and have issue, was not to wait till the natural expiration of the first estate for life to her, but was to take effect in her life-time, as soon as the contingency on which it was limited should happen; and that it was therefore not a *contingent remainder*, but a *conditional limitation*; because, although the condition, on which a remainder is limited, may happen before the expiration of the particular estate, and a contingent be thereby changed into a vested remainder, as in the cases of *Luddington v. Kime*, and other like cases (p. 371), yet a remainder cannot operate to abridge the duration of the prior estate, by *taking effect in possession* before the natural termination of such estate. But Buller J. remarked, that if B had married and had issue, her life-estate would not have merged, because it was not limited to take effect till the death of the wife; and Lord Mansfield, that here the first limitation was to two persons and the survivor, so that a preceding freehold will be in the survivor, and the estate over is limited on a contingency, upon which a remainder may depend. It is to B and her heirs if she should marry and have issue, and it must have taken effect after the death of the survivor. Upon these grounds, the limitation was held valid as a contingent remainder. There is nothing in the case which indicates, that it turned at all upon the consideration, that the remainder was limited to B, the tenant for life, herself; and the note of the Reporter shows, that he regarded this circumstance as wholly immaterial.

18. To render valid a condition, which operates by way of enlarging the prior estate, it is not necessary, that the respective estates be of such nature as to cause a merger. Thus, the prior estate may be *in tail*. So also the remainder may be limited after other intervening remainders. But the law requires, in order to effect such enlargement, 1. a subsisting particular estate for its foundation, which is neither at will, revocable, nor contingent. 2. That the particular estate remain in the original grantee or his representatives unalienated,

¹ Fearn, 396. 2 Cruise, 111.

² Doug. 753, and n.

for the sake of privity. 3. That the remainder take effect immediately on performance of the condition, without any other act or proceeding whatever. 4. The two estates must be created by one deed, or by several delivered at one time.¹

19. By *devise*, a condition may be made to defeat or abridge the preceding particular estate, operating as a *limitation*, to vest the property in the remainderman, without the necessity of an entry by the heirs of the devisor. This is termed a *conditional limitation*. And it will be effectual even against the heirs of the devisor, to whom the prior estate is limited.² It is said, that the expression and idea of a *conditional limitation* are adopted to avoid the necessity of an entry by the heir; and that in strictness, all conditional limitations are either executory devises or contingent remainders.³

20. Devise to A for life, after her death to B in fee; provided, that if the testator's wife should have a son, the land should remain to him in fee. Held, on the birth of the son, the remainder vested in him.⁴

21. More especially will this construction be given, where the estate which the condition operates to defeat is limited to the heir, who, therefore, if an entry were necessary, would have to enter upon himself; and where, consequently, the condition, as such, would be nugatory and void.

22. Devise to A, the heir, and another devise to B; and if A molest B, A shall lose his devise, and it shall go to B. A enters upon the land devised to B. Held, A's land thereby vested immediately in B.⁵

23. A limitation in remainder, by way of *use*, may also be valid, as a *future or shifting use*, though it operate to abridge or defeat the prior estate.⁶

¹ Lord Stafford's case, 8 Rep. 75.

² Fearne, 270, 407-9.

³ Doug. 756, n. 1.

⁴ Dyer, 33 a, 127 a. Cro. Jac. 592. Frye v. Porter, 1 Cha. Ca. 138^a 1 Mod. 300.

⁵ 2 Mod. 7.

⁶ 4 Kent, 249.

CHAPTER XLIV.

REMAINDER—BY WHAT ESTATE SUPPORTED.

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|--|---|
| 1. Contingent freehold remainder must be limited on a freehold.
4. Contingent remainder for years.
5. Possession not necessary—a right of entry sufficient—to sustain a remainder. | 9. Both estates must be created by one instrument.
13. Estate of trustees sufficient to support remainder. |
|--|---|

1. It has already been stated (p. 29), that a freehold cannot be limited to commence *in futuro*. Hence it follows, that a freehold contingent remainder, in order to be valid, must be preceded by a vested freehold estate; in which case the whole interest conveyed passes out of the grantor immediately, in connexion with the prior estate. But if this be less than freehold, a freehold interest cannot vest immediately any where, and the remainder is therefore void.¹

2. Devise to A for fifty years, if he live so long, remainder to the heirs male of his body. Held, the latter limitation was a void remainder.²

3. It has been seen, that where the particular estate is limited to A for years, remainder to B after the death of A; if the term is so long as to render it impossible or highly improbable that A should survive its expiration, the remainder will be deemed to be vested and not contingent. On the other hand, where the term is so short, that the life may probably outlast it, the remainder is contingent, and, being limited upon an estate less than freehold, is void.³

4. The reason of the rule above stated is inapplicable, where a remainder is not freehold, but only for years. Hence, the rule itself is stated not to apply to such a case.⁴ In an early decision,⁵ however, it was held, that a contingent remainder for years could not be limited upon a prior estate for years, not upon the ground above referred to, but because a lease for years operates *by way of contract*, and therefore the particular estate and the remainder estate operate as two distinct estates, grounded upon several contracts; whereas, in case of a contingent freehold remainder limited upon a preceding estate for life, the particular estate and the remainder is but as one estate in law, and is created by the livery.

¹ Fearn, 281.

² Goodright v. Cornish, 1 Salk. 226.

³ Fearn, 24-5.

⁵ Corbet v. Stone, T. Raym. 150-1.

⁴ 2 Cruise, 288. Fearn, 285, 430.

5. Although a contingent freehold remainder requires a preceding freehold to support it, it is not necessary that the latter should remain actually vested in possession in the tenant. It is sufficient, if, being out of possession at the time when the remainder would vest, he still retains a right of entry. Otherwise, if he has a mere right of action; for this supposes that the title is uncertain, and depends upon the doubtful event of a suit, till the termination of which, another party has a title apparently good. Thus, where the tenant is disseised, as he may regain his estate by entry, the remainder is still good. But if the disseisor die, as the possession of his heirs can be defeated only by an action of the rightful owner, the remainder is destroyed. So, in England, where tenant in tail, with contingent remainders, makes a feoffment in fee, and dies; inasmuch as his issue are driven to an action to regain their estate, the remainders are defeated.¹

6. The right of entry, to support a contingent remainder, must be a *present* right. It must also precede the happening of the contingency. If it commence at the same time as the latter, this is not sufficient.²

7. When once the right of entry is gone, the remainder is gone forever; and a new title of entry will not restore it. Thus, if there be tenant for life, with contingent remainder over, and the tenant for life make a feoffment upon condition, and the contingency happens before the condition is broken, or before entry for breach; the remainder is wholly destroyed, though the tenant for life should afterwards enter for condition broken, and regain his former estate.³

8. It would seem also, that, where the right of entry of the particular tenant is defeated by an *absolute* conveyance, the contingent remainder is destroyed, even though, *before* the contingency happens, the precedent estate is restored. Thus, if, in England, A, a tenant in tail, with remainder to the right heirs of B, makes a feoffment and dies, and the issue of A recover the land by action before the death of B, so that, when the remainder would take effect by B's death, the prior estate is restored; still, it seems, the heirs of B cannot take.⁴

9. A remainder must be created by the same instrument which creates the particular estate.⁵

10. A woman being tenant for life, her husband devised the estate to the heirs of her body, if they reached fourteen years. Held, an executory devise, and not a contingent remainder.⁶

11. A was tenant for life by marriage settlement, remainder to his wife for life, remainder to his sons by that marriage in tail. A's father, the reversioner, by will reciting the settlement, devised the lands to A's sons conformably to it; and if A should die without such issue, to A's sons by any other wife in tail male; and if A should die

¹ Fearn, 286. 1 Rep. 66 b.

² 4 Kent, 264-5.

³ Fearn, 302.

⁴ Fearn, 289.

⁵ See Fearn, 464. 2 Cruise, 296.

⁶ Snow v. Cutler, T. Raym. 162.

without issue, to his grandchildren in fee. Held, even if the words *without issue* gave the heirs of the body of A an estate by implication, A would not take an estate tail; for nothing was devised to him, and the devise could not be tacked to his estate for life, so as to produce the effect of one entire limitation.¹

12. A, being an owner in fee, and having previously limited a life estate to B, conveys to the use of himself for life, and after the death of B, and A her husband, to the use of C, son of A, for life. Held, inasmuch as these limitations were made by distinct deeds, C did not take a contingent remainder, as he otherwise would; but it was a conveyance to C of a subsisting remainder or reversion expectant upon B's death, and the mention of this event merely indicated the time when C should have possession, and did not make a contingency.²

13. The legal estate of *trustees* is sufficient to support contingent remainders, without any preceding trust of freehold.³

CHAPTER XLV.

REMAINDER—AT WHAT TIME IT SHALL VEST.

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|---|--|
| 1. Remainder must vest during, or immediately upon termination of, the prior estate.
5. Subsequent revival of prior estate does not render valid the remainder.
6. Remainder void, though a prior estate for years continues. | 9. Posthumous child.
10. American principle.
11. Entitled to past profits.
12. Vested remainder not affected by defeat of prior estate.
13. Remainder may become void <i>in part</i> . |
|---|--|

1. THE principle has been already alluded to, that a remainder, in order to take effect at all, must vest either during the continuance, or immediately upon the expiration of, the preceding estate. Thus, if a conveyance, be made to A for life, and upon A's death and one day after, remainder to B; the remainder is void. We have seen that this rule is founded in feudal principles, and in the inconveniences of an abeyance of the freehold. (p. 29).

¹ Fearn, 301-2. *Moore v. Parker*, 4 Mod. 316. (*Doe v. Fonnereau*, Doug. 486).

² *Weale v. Lower*, Pollex. 66.

³ Fearn, 303. (See p. 391).

2. A remainder will be good, if it is to vest immediately upon the termination of the preceding estate.¹

3. Limitation to A for the life of B, remainder to the heirs of the body of B. The remainder is good.²

4. Limitation to A and B for their joint lives, remainder to the heirs of him who shall first die. The remainder is valid.³

5. If the preceding estate is terminated at the time when the contingency happens, though it be afterwards restored, the remainder cannot take effect.⁴

6. The termination of a preceding *freehold* before the remainder can vest, defeats the remainder, though a preceding estate for years still continue.

7. Conveyance to A for years, remainder to B in tail, remainder to the heirs of A. This gives a contingent remainder to A's heirs. Hence, if B die without issue before A, inasmuch as the preceding freehold estate terminates before the remainder can vest, the latter becomes void.⁵

8. A testator devises to his wife for life, remainder to A, his son, for ninety-nine years, if he should so long live; after the deaths of the wife and A, to the heirs of the body of A, with a power to A of appointing to all his children. The wife dies, living A. Held, the limitation to the children of A was thereby defeated.⁶

9. In conformity with the principle above stated, it was formerly held, that under the limitation of a remainder to the children of the particular tenant, a *posthumous child* could not take, not being in existence at the termination of the preceding estate. But a decision to this effect, made by the Court of Common Pleas and the Court of Kings Bench (Lord Somers dissenting) in the case of a will, was reversed by the House of Lords, all the Judges dissenting. Afterwards, the Statute 14 Wm. III. c. 14, provided, that where an estate is limited by any *settlement* to a child or children of any person, remainder over,* a posthumous child shall take.⁷

10. It is the established principle of American law, that a posthumous child shall take both by descent and express limitation, equally with others.⁸ It was early held in New York,⁹ that although the Statute of William is not in force in that State, having been expressly repealed; yet, independently of this act, the English law is settled in favor of the claim of a posthumous child. On principles of natural

¹ Fearn, 310. 4 Kent, 248.

² Co. Lit. 298 a.

³ Ib. 378 b.

⁴ Fearn, 464.

⁵ Jenk, 248. 2 Rolle's Abr. 418.

⁶ Doe v. Morgan, 3 T. R. 763.

⁷ 4 Ves. 342. Reeve v. Long, Salk. 227.

⁸ 4 Kent, 248.

⁹ Burdet v. Hopegood, 1 P. Wms. 486.

¹⁰ Stedfast v. Nicoll, 3 John. Cas. 18. (5 S. & R. 38. 2 Paige, 35. 5 Mass. 535.

1 M'Cord's Chs. 551. 3 Mun. 20. Aik. Dig. 94).

* But for a remainder, the children would take by descent. This, it seems, is the reason for limiting the provision to cases of remainder.

justice, such child has the same rights with others. The civil law never makes a distinction, and the common law very rarely. Thus, a posthumous child takes a share under the statute of distributions, and by descent. So, the birth of such child (with marriage) revokes a will. Independent of the Statute of William, the decision of the House of Lords, which was the determination of the highest tribunal of the English law, must be considered as prescribing the rule at *common law*; and inasmuch as the old technical rule, which requires a remainder to vest at the very instant when the preceding estate terminates, was founded on feudal reasons not now in force, this furnishes an additional ground for adhering to the later doctrine.

11. A posthumous child is entitled, under the statute, to the profits of the estate accruing since the father's death. The act provides, that he shall take as if born before the parent's death; and this distinguishes the case from that of an heir, who does not thus take. The same construction necessarily arises from the provision in the statute, that trustees, to preserve contingent remainders, shall not be necessary. The estate is held to vest in the person next entitled after the father's death, and upon the birth of a child to divest *by relation*; as in the case of the enrolment of a deed, which relates to the making. Hence the child may either maintain ejectment, laying the demise from the father's death, which the defendant will be estopped to deny; or bring a bill in Equity for an account, as against a trustee.¹

12. A vested remainder is not necessarily avoided by the defeating of the preceding estate. Thus, A conveys to B for life; and afterwards, having disseised B, makes another conveyance to C for the life of B, remainder to D. B enters and avoids the estate of C. D's remainder is not thereby defeated. So, where the preceding estate is limited to an infant, and, on coming of age, he disaffirms it: a remainder limited after such estate is still good.²

13. Where the preceding estate is limited to several persons, if a part of them die before the contingency happens, the remainder will be in part defeated. On the other hand, where the remainder is limited to persons not in esse, if some only are born during the particular estate, the remainder as to the rest will be void. Limitation for life to A, remainder to the heirs of B and C. B dies before A; C survives A. The heirs of B shall take; but not those of C. This principle, however, it seems, is not applicable to devises and uses.³

¹ Basset v. Basset, 8 Vin. Abr. 87. 3 Atk. 203.

² Co. Lit. 298 a. 4 Kent, 234-5.

³ Gilb. Ten. 252. Fearne, 310. Ib. 312. Co. Lit. 9 a. Comb. 467. 2 Cruise, 302.

CHAPTER XLVI.

REMAINDER. REMAINDER BY WAY OF USE.

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| <p>2. Since the Statute of Uses, a freehold trust necessary to support contingent remainders.</p> <p>4. Preceding trust must continue till the contingency happens.</p> <p>6. Resulting trusts sufficient to support remainders.</p> | <p>7. Contingent uses arise out of seisin of trustees—discussions upon this subject—Chudleigh's case, &c.</p> <p>14. Springing and shifting uses.</p> |
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1. REMAINDERS may be limited by way of use, and are indeed more often limited in this mode than in any other.

2. With respect to remainders by way of use, a very material alteration in the law was effected by the Statute of Uses. Before this statute, if a freehold legal estate was vested in trustees, although the preceding or particular trust estate were less than freehold, the legal freehold of the trustees was sufficient to support contingent remainders. Thus, a limitation would be good to trustees and their heirs to the use of A for years, remainder to the right heirs of B. But after the Statute of Uses, the effect of which is immediately to divest the estate of the trustee, such a limitation as to the heirs of B would be void.

3. A conveys by lease and release to trustees and their heirs to the use of himself for years, remainder to the use of trustees for years, remainder to his heirs male. Held, the last remainder was void.¹

4. Upon the same principle, a freehold estate in trustees is insufficient to support a contingent remainder, where the particular estate in trust terminates before the contingency happens.

5. A and B, his wife, levy a fine of B's land to the use of the heirs of the body of A on B begotten, remainder to the use of A's right heirs. They had issue, which died; then B died, then A. Held, the limitation to A's heirs was void; that, inasmuch as the land belonged to B, no use resulted to A; and though B might have a resulting freehold use, which would support the remainder to the issue, yet, as she died living A, such freehold would not support the remainder to A's heirs, since he could have no heirs during his life.²

6. But where a freehold estate *results* to the party who makes a

¹ Adams v. Savage, Salk. 679.

² Davies v. Speed. Show. Parl. C. 104. Salk. 675 n. (See p. 388).

limitation to uses, it seems to be as effectual to support remainders, as if expressly limited to a third person.¹

7. On the other hand, it seems that a prior freehold limitation of a use is not sufficient to sustain a subsequent contingent use; upon the principle, that *a use cannot arise out of a use*. Thus, although, as has been seen, a limitation to A for life, remainder to the heirs of B, creates a valid contingent remainder, supported by A's life estate; yet, if the limitation were made to A in fee to the use of B for life, remainder to the use of the heirs of C, such remainder would not be supported by B's life estate, but must rest upon the estate of the trustee.

8. Upon the question, in what manner future contingent uses are supported and carried into effect by the estate of the trustees, Lord Hardwicke remarks, in *Garth v. Cotton* (Dickens, 183), that "the Judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend." These reasonings, in the connexion in which they were used, had a practical bearing; because they involved the question, as to the power of trustees to *destroy* contingent remainders—a subject which will be considered in the next chapter. But, supposing no act to have been done by the trustees to destroy the remainders, their validity, as having a sufficient preceding estate to support them, does not appear to have been questioned.

9. Chancellor Kent gives substantially the following account of the controversy referred to.²

10. Before the Statute of Uses, the feoffees to uses were seised of the legal estate; and, if disseised, no use could be executed, until by entry they had regained their seisin; for the statute only executed those uses which had a seisin to support them. After the Statute of Uses, it was difficult to ascertain by what estate contingent uses were to be supported. Some held, that the estate was vested in the first cestui que use, subject to the uses which should be executed out of his seisin; but this opinion was untenable, for a use could not arise out of a use. It was again held, the seisin to serve contingent uses was *in nubibus* or *in custodia legis*, or had no substantial residence any where. Others were of opinion, that so much of the inheritance as was limited to the contingent uses, remained actually vested in the feoffees until the uses arose. But the prevailing doctrine was, that there remained no actual estate, and only a possibility of seisin, or a *scintilla jûris* in the feoffees or releasees to uses, to serve the contingent uses as they arose. This doctrine was first started in *Brent's case*,³ in 16 Eliz. In *Manning and Andrews' case*,⁴ the Judges were equally

¹ *Penkay v. Hurrell*, 2 Freem. 258. 2 Cruise, 308.

² 4 Kent, 237-45. (See Dickens, 183. Pollex, 385).

³ *Dyer*, 340 a. 2 Leon, 14.

⁴ 1 Leon. 256.

unsettled in their notions respecting the operation of the statute on contingent uses. Some of them thought a sufficient seisin remained in the trustees to support the future uses; while others held, that no seisin remained in them, but that the statute drew the confidence out of them, and *reposed it upon the land*, which rendered the use to every person entitled in his due season. In a few years, Chudleigh's case¹ arose, which is the leading case upon this subject. A minority of the Judges here held, that the notion of a *scintilla* remaining in the trustees was as imaginary as the Utopia of Sir Thomas More; that their original seisin was sufficient to serve the future as well as present uses; and that the future uses were *in the preservation of the law*, till they became vested. But a majority of the Judges held, that the statute could not execute any uses that were not *in esse*; that not a mere *scintilla* remained in the feoffees, but a sufficient estate to serve the future uses, unless their possession was disturbed, and their right of entry lost. From these several cases the doctrine has been deduced, that future uses cannot be executed without a remaining right or estate in the feoffee. The estate in the land is supposed to be transferred to the *person* who has the estate in the use, and not *to the use*; and it is inferred, that no use can become a legal interest, until there shall be a person in whom the estate may vest.

11. But this view of the subject has been opposed by very distinguished writers upon Real Property, Mr. Fearn and Mr. Sugden. The latter takes the ground, that the doctrine of a *scintilla juris* was never judicially decided, but has been deduced from extra-judicial dicta; that the statute draws the whole estate in the land out of the feoffees, and the prior estates take effect as legal estates, and the contingent uses take effect, as they arise, by force of the original seisin of the feoffees. If there are any vested remainders, they take effect, subject to open and let in contingent estates, when the contingency occurs. Thus, in a conveyance in fee to A, to the use of B for life, remainder to his unborn sons in tail, remainder to B in fee; the statute immediately draws the whole estate out of A, vesting it in B and C respectively, which exhausts A's entire seisin. The estate to the sons of B is no estate, till they are born; and the statute did not intend to execute contingent uses, but the contingent estates are supported by holding that the interests of B and C are vested only *sub modo*, with a liability to open. A retains no *scintilla*, but the contingent uses, when they arise, take effect, *by relation*, out of the original seisin.

12. Mr. Preston is of opinion, that limitations of contingent uses give contingent interests, and that the estate may be executed *to the use*, though there is no person in whom it can vest. The statute

¹ 1 Co. 120. 1 And. 309. (The latter report said to be indisputably the best. 4 Kent, 239 n).

passes the estate of the feoffees in the land, to the estates and interests in the use, and apportiones the former estate accordingly. No *scintilla*, or the most remote possibility of seisin, remains with the trustees.

13. Mr. Cornish asserts, that the doctrine of *scintilla juris* rests on paramount authority.

14. Remainders, limited by way of use, may be vested in favor of one person, and afterwards, on the birth of another person or the happening of some other event, divested wholly or in part, and vested in new parties. This point has been already adverted to under the title of Uses and Trusts, (pp. 193–8). Some of the cases, which will be mentioned in illustration of the principle, are not strictly instances of *remainder*, but they are not distinguishable in reason from those which are.

15. In the first place, where a remainder is limited by way of use to several persons, or to a class of persons, who become capable of taking at different times, though it vests wholly in one, it will become divested in part, and let in the others to a proportional share. In this respect, however, uses seem not to differ from legal estates.

16. Limitation to the use of A for life, remainder to the use of B, his wife, for life, remainder to all their issue female. Upon the birth of a daughter, the remainder vests in her, but, upon the birth of a second daughter, the latter also shall take a share of the estate.¹ (See p. 378).

17. Another class of future uses, are those limited to arise *in futuro*, without any preceding estate to support them; or uses which change from one person to another by matter *ex post facto*, though the first use were limited in fee. These, of course, are not strictly remainders.

18. Limitation to the use of one, and of such wife as he shall afterwards marry. Upon his marriage, the wife takes with the husband.²

19. A, in consideration of love and affection to B, his brother, and of £100 paid by him, granted, released, and confirmed to B, then in possession as lessee for a year, in tail, after the death of A. Held good as a covenant to stand seised, though void as a lease and release, and that the estate vested in B after A's death as a springing use.³

20. Where the conveyance to uses operates without any change of possession, the springing use arises out of the seisin of the covenantor; where there is a change of possession, out of that of the first grantee to uses.⁴

21. The class of uses already referred to are called *springing uses*. A few cases will be mentioned of *shifting* or *secondary uses*; which

¹ *Mathews v. Temple*, Comb. 467. 1 Ld. Raym. 311. *Doe v. Martin*, 4 T. R. 39 acc.

² *Mutton's case*, Dyer, 274 b. *Woodliff v. Drury*, Cro. Eliz. 439.

³ *Roe v. Tranmer*, 2 Wils. 75.

⁴ 2 Cruise, 311.

are defined, as uses limited so as to change by matter *ex post facto*.¹ The distinction, however, between the different classes of future, contingent uses, seems to be very nice, and not always accurately observed by writers of authority. Chancellor Kent says, springing uses arise on a future event, where no preceding estate is limited; while shifting or secondary uses take effect in derogation of some other estate.²

22. A conveys to the use of B and his heirs, till C shall pay B £40, then to the use of C and his heirs. Upon payment of this sum, held, C should have the estate. The only doubt was, whether the right of entry belonged to C himself, or to the feoffee to uses.³

23. So A may convey to trustees and their heirs to their own use; but, unless they pay a certain sum in a certain time, to the use of A, with remainders over. Upon non-payment, the estate vests in A, and the remainders take effect.⁴

24. Conveyance of two estates, S. and T.; of the former to the use of A. in fee, and of the latter to the use of B. in fee, until A. should be evicted from S. by B's. wife; then T. to the use of A. till his loss should be satisfied from the profits of T. Held good.⁵

25. A, tenant for life, and B, the reversioner, covenant to levy a fine to the use of A in fee, unless B pay A 10 s. at a certain time; if he should pay it, to the use of A for life, remainder to B in fee. A has a fee till payment of the money.⁶

26. A and B, sisters, in consideration of £4000 paid to A, and of a marriage proposed between B and C, convey to trustees in fee, to the use of C for life, remainder to B for life, remainder to the children in tail, remainder to C in fee; but if both B and C should die leaving no issue, and the heirs of B should, within twelve months from the death of the survivor of them, pay the heirs or assigns of C £4000, the remainder in fee to C and his heirs to cease, and the premises to remain to the use of the heirs of B. Held, a good shifting use.⁷

27. Where there is any preceding estate to support a future use, it will be construed as a contingent remainder, and not a springing or shifting use.⁸

28. The remark already made (s. 18) as to the seisin, out of which a springing use arises, is equally applicable to shifting uses.⁹

29. But such use cannot arise out of the seisin of the prior *cestui que use*. Conveyance to A to the use of B in fee; and if C pay B a certain sum, B to stand seised to the use of C in fee. This is a void limitation as to C.¹⁰

¹ 2 Cruise, 311.

² 4 Kent, 296-7.

³ Bro. Abr. Feoffment al Use, pl. 30.

⁴ Harwel v. Lucas, Moo. 99. 1 Leo. 264.

⁵ Kent v. Steward, 2 Rolle's Abr. 792. Cro. Car. 158.

⁶ Spring v. Caesar, 1 Rolle's Abr. 413.

⁷ Lloyd v. Carew, Show. Parl. Cas. 137.

⁸ 2 Cruise, 315.

⁹ Ibid.

¹⁰ Chudleigh's case, 1 Rep. 137 a.

CHAPTER XLVII.

REMAINDER—HOW DEFEATED.

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| 1. By destroying the particular estate.
2. Whether by a mere <i>change</i> of estate.
3. Where the particular estate and a subsequent remainder unite, whether contingent remainders destroyed.
<i>Distinction of cases.</i> | 10. Remainder by way of use, how destroyed; whether actual seisin necessary, &c.
19. American opinions and cases. |
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1. INASMUCH as a remainder must take effect either before or immediately upon the determination of the preceding estate; it follows that any act, which destroys such estate before the contingency happens, will destroy the remainder also. Hence, in England, where a tenant in tail or tenant for life, with remainders over, makes a feoffment, or suffers a fine and recovery; as by these acts his estate is divested, the remainders also become void. The same effect follows from a surrender to the owner of the reversion or a vested remainder by tenant for life; or a conveyance to him of the reversion or a vested remainder, whereby his life estate is extinguished. But not from any such conveyance by tenant for life, as will pass only the estate which he has; such as a bargain and sale, or lease and release. It has already been stated (pp. 40–1) as the general rule of American law, that no conveyance by a particular tenant will be effectual to pass more than his own estate. Hence, it seems, such conveyance will not in any case operate to defeat contingent remainders. But perhaps the English law as to the effect of a *surrender* remains unchanged.¹

2. How far any mere *change* in the preceding estate will operate to defeat contingent remainders, seems to be an unsettled point. Mr. Fearné supposes that the change must be one of *quantity*, not merely of *quality*. Thus, where the preceding estate was limited to two persons, a release from one to the other was held not to destroy the remainders. But, on the other hand, where the particular estate descended to parceners, who made partition, it was held, that the remainders were defeated.²

3. The alterations in the estate preceding a contingent remainder,

¹ 1 Rep. 135 b. Co. Lit. 252 a. Archer's case, 1 Rep. 66. 1 Vent. 188. Poller. 389. Thompson v. Leach, 2 Salk. 427. Fearné, 468, 323. Purefoy v. Rogers, 2 Saun. 380. 4 Mod. 284.

² 2 Cruise, 319. Fearné, 337. 4 Leon, 237. Harrison v. Belsey, T. Raym. 413. (2 Saun. 386).

above referred to, are those made by the act of the particular tenant himself. Such changes may also arise from the acts of third persons; and, upon this point, the following distinctions have been made.

4. Where the same conveyance, which creates the particular estate and the contingent remainder, creates also the subsequent vested remainder; or where the reversion in fee *descends*, from a testator who limits such particular estate and contingent remainder, upon the particular tenant, there will be no merger, effectual to destroy the contingent remainder; but the two estates between which it is interposed will unite *sub modo*, and, when the contingency happens, will open or separate to let in the contingent remainder. Any other construction would manifestly defeat the intention of the party limiting the estates, both in regard to the particular estate, which would merge, and in regard to the contingent remainder, which would be destroyed, by the very act which created them.¹

5. Limitation to A and B, his wife, for their lives, after their decease to their first issue male, &c., and for want of such issue to the heirs male of the body of A. A and B take an estate tail, subject however to the condition, that upon the birth of issue male the estate shall open, and leave an estate for life in A and B, remainder to their issue in tail male, remainder to the heirs of the husband.²

6. Devise to A, the testator's eldest son, for life; if he should die without issue living at his death, then to B in fee; but if he should leave such issue, then to A's right heirs forever. Held, although the reversion in fee descended upon A, he was still tenant for life, with contingent remainders, which were not defeated. Nor could A's life estate merge in the remainder to his heirs, the latter being contingent.³

7. But where the particular tenant, upon whose estate contingent remainders are limited, acquires a remainder or reversion in fee, not by a limitation or a descent concurrent in time with the creation of his prior estate, but by a subsequent descent, though acting through the party who limited the estates; as the same reason does not operate to prevent a merger, which has already been stated in relation to the former case, such merger will take place, and the contingent remainders be destroyed.

8. A was tenant for life, remainder to B, his son, for life, remainder to B's first son in tail, remainder to the heirs of the body of A. A dies before B has a son, and the estate tail descends upon B. The remainder to B's son is destroyed.⁴

9. Conveyance to the use of A and his wife for life, remainder to the use of B, the son of A, for life, remainder to B's sons in tail, &c., remainder to A in fee. A and his wife die, leaving B. Held,

¹ Fearn, 503.

² Bowles' case, 11 Rep. 79. (1 Rep. 66. Pollex. 389).

³ Plunket v. Holmes, T. Raym. 23. 2 Cruise, 321. 2 Bos. and P. 297.

⁴ Kent v. Harpool, 1 Vent. 306. T. Jones, 76.

B's life estate was merged in the fee which descended upon him, and the remainders destroyed.¹

10. With respect to contingent remainders, limited *by way of use*, how far they are liable to be destroyed by acts affecting the estates upon which they depend, is a point that has already been somewhat considered. The celebrated controversy, noticed in the last chapter, as to the *scintilla juris*, *Chudleigh's case*, &c., derives all or most of its *practical* importance from its connexion with the question, whether trustees have power to destroy contingent remainders. Upon this subject, the decided cases, as well as the statements and opinions of elementary writers, are exceedingly confused and contradictory; and there is great reason for the remark of Mr. Preston, that the doctrine requires to be settled by judicial decision.²

11. With respect to contingent remainders, *by way of use*, Mr. Cruise makes a distinction* between those which arise *without any change of possession*, that is, by a *covenant to stand seised to uses*, or *bargain and sale*; and those created by a *change of possession*, or by a *feoffment or conveyance to uses*.³ In the former case he says, that *actual seisin* is necessary to give effect to the remainders, and not a mere *right of entry*, as in case of legal estates; because the use arises out of the estate of the covenantor, and this, according to the language of the statute, must be a *seisin*. Hence, any act or transfer of the covenantor, by which his *seisin* is divested, defeats the subsequent contingent remainders.

12. A covenants to stand seised to the use of himself for life, remainder to the use of B for life, remainder to the use of C for life, remainder to the use of the first son of C in tail male, with the reversion in fee to A. A grants the reversion to D, without consideration, and reciting the uses; and afterwards makes a feoffment of the land. After A's death, B enters, and dies seised, C having died previously. It was held, that the contingent remainder to the son of C was not defeated by the grant and feoffment of A; that D took the reversion charged with the uses, and the feoffment could not defeat D's right of entry; and that the entry of B operated to revest D's estate, and restore a *seisin* which would support the contingent remainder. If A had made the feoffment before granting the reversion, as the law would not allow him to re-enter against his own deed, the entry of B would not inure to his benefit, and the contingent remainders would therefore be destroyed.⁴†

¹ Hooker v. Hooker, Rep. Temp. Hardw. 13. (Duncomb v. Duncomb, 3 Lev. 437).

² Prest. on Est. 184.

³ 2 Cruise, 324-5.

⁴ Wegg v. Villers, 2 Rolle's Abr. 796. 1 Ventr. 188.

* I have been unable to find any case, where this distinction is expressly recognised.

† These limitations and subsequent transfers were made by Lord Coke, for the purpose of enabling himself to preserve or destroy the contingent remainder at his discretion, by producing the grant and destroying the feoffment, or the converse. But it is said, he died before executing his plan.

13. Mr. Cruise proceeds to remark,¹ that where a limitation to uses is made by some conveyance which operates by a *change of possession*, the doctrine established in Chudleigh's case would lead to the conclusion, that any act which divests and turns to a right the particular, preceding estate, destroys the contingent uses, unless either the particular tenant or the feoffee to uses re-enters; for otherwise no possibility of entry or "*scintilla juris*" remains to constitute the seisin, out of which uses must arise. The doctrine of that case is, that the grantee to uses is considered the *donor* of all the contingent estates when they vest. This principle, however, has been strongly contested by Lord Ch. J. Pollexfen;² upon the grounds, that it would place a dangerous power in the hands of those who are seised to uses, who are said to be generally "*strangers and mean persons*," and greatly endanger the security of titles; by enabling grantees to uses to deprive themselves, by their own unlawful acts, of a right of entry, and thus defeat all contingent estates limited by way of use. The same Judge, and also Mr. Fearn,³ urge the still stronger consideration, in opposition to this principle, that it is in direct contradiction to the words and uniform construction of the Statute of Uses; according to which, the grantee to uses is a mere instrument or *conduit pipe*, all his estate being immediately taken and transferred out of him, as if never vested. The *cestui que use* is seised, "to all intents, constructions and purposes in the law," as a grantee to uses would be before the statute; and one of the legal qualities of a legal estate is, that where a particular tenant, though deprived of his estate, has left in him *a right of entry*, this is sufficient to support subsequent contingent remainders. Hence, where such right remains in the *cestui*, no divesting of the estate from the trustee would seem sufficient to defeat such remainders.

14. The doctrine, that where a limitation to uses operates by a *change of possession* (although no peculiar effect seems to have been attributed to this circumstance), contingent remainders may be defeated by the act of the trustees in transferring the estate; derives its great support from Chudleigh's case,⁴ which has been already several times referred to. In this case, A enfeoffed several persons to the use of them and their heirs, during the life of B, remainder to the use of the first and other sons of B in tail. Before B had a son, the trustees conveyed to B in fee, without consideration, and with notice of the uses.* B afterwards had a son. Held, the remainder to this son was

¹ 2 Cruise, 325.

² Hales v. Riale, Pollex. 383. Treat. of Eq. B. 2, c. 6, s. 1.

³ Fearn, 300.

⁴ 1 Rep. 120. Poph. 70.

* In another case (Wood v. Reigold, Cro. Eliz. 764), though recognising the general doctrine, that contingent uses may be defeated by the feoffee, upon the grounds, that the use ought to arise out of the estate which the covenantor had at the time of the covenant, and that the statute executes only vested uses or those in *esse*, leaving contingent uses as at common law; it is intimated that, according to the very reason of the rule last named, a party taking the land without consideration or with notice, is chargeable with the contingent use when it arises.

destroyed by the feoffment of the trustees, which operated as a forfeiture of the particular estate.

15. Many other cases are to be found in the books,¹ which settle substantially the same principle. These are generally cases of a *feoffment* made by the trustee or by the particular tenant, whereby the particular estate is defeated. The same principle is applied to *springing* or *shifting* uses, which are not strictly remainders, though hardly distinguishable from them. Thus, a devise of the land, from which such uses are to arise, will defeat them; though, it seems, a mere devise of portions from it will not.

16. A levied a fine, to the use of himself and his heirs till a marriage had between B, his son, and C, then to the use of A for life, remainder to B in tail, &c. The marriage took place, A, however, having previously devised portions from the land to his daughters, and died. Held, a devise of the land itself would have defeated the future use; but it was doubted whether a mere devise of portions from it had this effect.²

17. Whether a mere lease for years, or the grant of a rent from the land, will wholly defeat the future use, seems to be a doubtful point, though the weight of authority is that it will not. But such transfer has been held to bind the use when it arises, *pro tanto*. Even this point, however, was disputed by Fenner J. in *Wood v. Reignold*,³ who said, "the same freehold remains, and the use is annexed to the lease, and therefore the lease shall not disturb nor bind it." So, in *Bould v. Winston*,⁴ where the party covenanting to stand seised remained seised of the reversion in fee, and afterwards made a long lease to defeat the contingent remainder; it was held, that the lease should take effect out of the reversion, and not in such way as to defeat the remainder. In another case,⁵ a lease was held wholly to defeat the contingent use.

18. The cases, in which a conveyance made by a feoffee or covenantor to contingent uses, has been held to defeat such uses, are said to be very unsatisfactory, and to be contradicted by others of equal authority, one of which was decided by the House of Lords.⁶

19. Chancellor Kent says,⁷ in Equity, the tenant for life of a trust cannot, even by a fine, destroy the contingent remainder dependent thereon; and it will only operate on the estate he can lawfully grant. A Court of Equity does not countenance the destruction of contingent remainders. So, any conveyance of a thing *lying in grant*, does not bar a contingent remainder; nor a conveyance deriving effect from the

¹ *Biggot v. Smyth*, Cro. Car. 102. *Brent's case*, Dyer, 340 a. 2 Leon. 14.

² 2 Cruise, 323.

³ Cro. Eliz. 854.

⁴ Cro. Ja. 168. Noy. 122.

⁵ *Barton's case*, Moo. 743.

⁶ 2 Cruise, 332. *Smith v. Warren*, Cro. Eliz. 688.

⁷ 4 Kent, 253-4.

Statute of Uses ; because neither of these passes any thing more than the grantor has a legal title to. There are also some acts of a tenant for life, which, though amounting to a forfeiture, and authorizing an entry by a subsequent vested remainderman, do not destroy the contingent remainder, unless such entry or other equivalent act be made or done. The same author also remarks,¹ that Chudleigh's case is a strong authority to prove that a feoffment without consideration, and even with notice in the feoffee of the trust, will destroy a contingent remainder. It is a doctrine flagrantly unjust, and repugnant to every settled principle in Equity, as now understood.

20. Very few cases have occurred in the United States, in which the question, as to the power of the particular tenant to defeat contingent remainders, has arisen. In an early case in Pennsylvania,² a tenant for life, with contingent remainders depending upon his estate, had suffered a common recovery ; and the Judges were divided in opinion as to the effect of this proceeding upon the remainders. Ch. J. Tilghman, who was of opinion that the remainders were destroyed, remarks as follows :—The great Hamilton estate, near Philadelphia, was tied up by the late Gov. Hamilton's will, to a number of life estates, with contingent remainders depending on them ; but he omitted to appoint trustees for preserving the contingent remainders. Under the direction of very able counsel, common recoveries were suffered, for the purpose of destroying the contingent remainders, and many estates were sold for valuable and full considerations, on the faith of the common law, which had never been altered, either by act of assembly or judicial decision. The objection, that the law of forfeiture is founded on feudal principles, is of no weight. Those principles are so interwoven with every part of our system of jurisprudence, that to attempt to eradicate them would be to destroy the whole. They are massy stones worked into the foundation of our legal edifice. Most of the inconveniences attending them have been removed, and the few that remain may easily be removed, by acts of the legislature. In that way, the future may be provided for, without injuring the past. But should this Court undertake to shake a principle which has become a rule of property, the mischief would be incalculable. I doubt very much, whether it be not the policy of this country to facilitate the destruction of contingent remainders, (as well as of estates tail). They tend to prevent the free enjoyment and alienation of land ; whereas, the spirit of our constitution and laws has a direct contrary tendency. They tend to throw large estates into one hand ; but the object of our laws is to divide them among many.

21. On the other hand, in the same case,³ Gibson J. says, entailments and contingent remainders stand on different ground. Indefinite

¹ 4 Kent, 252 n.

² Dunwoodie v. Reed, 3 S. & R. 447-8.

³ Ibid. 457.

restriction or alienation is contrary to the genius of our laws; but restriction to a reasonable extent is tolerated. Land ought not to be transmissible like chattels. Convenience, and the state of society in this country, begin to require a more complex settlement and disposition of real property than has hitherto prevailed. This, it is said, may be effected, and these contingent interests secured, by interposing trustees to preserve contingent remainders. But this is a form of limitation rarely thought of, especially where the disposition of property is the last act of a man's life.

22. In the case of *Carver v. Jackson*,¹ it seems to have been taken for granted, that the confiscation of a preceding estate for life will defeat contingent remainders depending upon it.

CHAPTER XLVIII.

REMAINDER. TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

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| <ol style="list-style-type: none"> 1. Origin and history. 3. Trustees take an estate. 4. May destroy the remainders; but it is a breach of trust. 5. Exceptions—remote relations may be barred. 7. If remaindermen join; no breach of trust. | <ol style="list-style-type: none"> 8. Chancery sometimes directs a conveyance in favor of mortgagees, creditors, &c. 12. But generally will not interfere. 16. Trustees cannot safely defeat the remainders. 17. Power and duty in case of waste. |
|---|---|

1. FROM the rule, that the alienation or forfeiture of a preceding estate for life would defeat contingent remainders limited upon such estate, the practice arose, of limiting an intermediate estate to trustees, to take effect upon the termination of the life estate before the death of the tenant, and continue during his life. The invention is ascribed to Sir Orlando Bridgeman and Sir Geoffrey Palmer, who, during the civil wars, devoted themselves to the business of conveyancing. Such trustees are called trustees to preserve contingent remainders.²

2. Lord Hardwicke remarks, that the practice in question arose from the decision of two great cases, reported by Lord Coke, viz: *Chudleigh's case* and *Archer's case*, though it was several years after

¹ 4 Pet. 1.

² 2 Cruise, 336-7.

those cases before that light was struck out; and it was not brought into general use till the time of the usurpation, when probably the providing against forfeitures for what was then called treason and delinquency, was an additional motive to it.¹

3. It was formerly questioned, whether trustees to preserve remainders, after a prior limitation for life, took any *estate* in the land, or merely a right of entry upon the forfeiture or surrender of such tenant, by reason that the limitation, being only during his life, could not commence or take effect after his death. But it was settled in *Cholmondely's case*, and *Duncomb v. Duncomb*, that they take a vested remainder. And this is *a fortiori* the case, where the prior estate is only for years, because the first freehold is then in the trustees. It has also been argued, that the interposition of trustees to preserve, &c. was not intended to alter the legal rights of a preceding tenant for life, or of the ultimate remainderman in fee. But the Court held, that such interposition was designed to abridge the legal rights of both these parties; the right of the former to destroy the contingent use of the inheritance, while it remains contingent; and the right of the latter to destroy it, by accepting a surrender.²

4. A trustee to preserve contingent remainders has the power to defeat them, by joining in a conveyance with the preceding tenant. Such trustee has been called *honorary*, as signifying a discretionary power in this respect. But this act is a plain breach of trust, and a grantee, without consideration or with notice, will take the land charged with the trust. It is said, that should the Court hold it to be no breach of trust, or pass it by with impunity, it would be making proclamation, that the trustees in all the great settlements in England were at liberty to destroy what they had been entrusted only to preserve. In case of a conveyance for consideration or without notice, the trustee will be decreed to purchase other lands of equal value, and hold them upon the same trusts.* These principles were first solemnly settled in the great case of *Mansell v. Mansell*, which was decreed by Sir J. Jekyll, at the Rolls, and afterwards by Lord King, assisted by Lord Raymond and Lord Ch. Baron Reynolds. Lord Raymond said, it was strange in natural reason to say, that where a man hath created a trust to preserve his estate, the trustees may break that trust and give away the estate with impunity.³

¹ *Garth v. Cotton*, Dickens, 183.

² *Garth v. Cotton*, Dickens, 183. 2 Co. 5 a. 3 Lev. 437.

³ *Woodhouse v. Hoskins*, 3 Atk. 22. *Pye v. Gorge*, 1 P. Wms. 128. *Mansell v. Mansell*, 2 P. Wms. 678. For. 252. 2 Abr. Eq. 747.

* Lord King said, (2 P. Wms. 678), that though these points had not been before judicially determined, yet it seemed to the Court in common sense, reason and justice, to be capable of no other construction; Lord Harcourt (1 P. Wms. 128), that if, as was said, there was no precedent, he would make one; and (*Tipping v. Pigot*, 1 Ab. Eq. 385), that it would be dangerous for any trustees to make the experiment, and if it should ever come in question, he thought the Court would set aside such a conveyance.

5. This rule, however, seems to have been established, chiefly for the protection of the immediate parties to a settlement or their issue; and not to have been extended to the relief of remote collateral heirs. The former are regarded in law as purchasers; the latter as mere voluntary claimants, not entitled to the aid of a Court of Equity.

6. A settlement was made in consideration of a marriage and a fortune, for the purpose of settling the lands in the name and blood of the husband. Limitation to trustees, in trust for the husband for ninety-nine years, if he should so long live, remainder to trustees during his life to support, &c., remainder to the sons of the marriage, remainder to the heirs of the body of the husband, remainder to his right heirs. After the marriage, the husband and wife and trustees to support joined in a fine and conveyance, with different limitations from those stated, providing a jointure, and giving the ultimate remainder to strangers. Husband and wife having died without issue, the heirs of the former brought a bill to set aside the latter conveyance. Held, they were not entitled to relief.¹

7. If the party to whom a remainder is limited join the trustees in their conveyance, this will be no breach of trust. And upon a similar principle, where such remainder is limited *to the heirs of the body of A*, and is therefore contingent, if the eldest son or heir apparent of A join the trustees in a conveyance, and afterwards die, Chancery will not set aside the conveyance on application of a second son of A, during his father's life, because it is uncertain whether he will survive his father, and therefore come under the designation of *heir*.²

8. A Court of Chancery, under some circumstances, will direct trustees for preserving contingent remainders, to join in conveyances made for the purpose of barring such remainders. Thus, where a mortgage was made of the land, before the settlement by which the remainders are limited, and after such settlement the party who made it contracts for a sale of the equity of redemption; and the proposed purchaser files a bill against the settler and the trustees, praying that they may join in a conveyance to him, averring that there are no issue for whose benefit the trust was created, and that the mortgagee will foreclose unless the mortgage is redeemed, which the settler is unable to do; and the defendants by their answer submit to the direction of the Court—the conveyance prayed for will be decreed, the trustees being indemnified, and the wife of the settler, one of the objects of the settlement, being privately examined to ascertain her consent.³

9. So also, Chancery will decree that trustees join in a conveyance, where the first remainder has become vested, and it is for the interest of this remainderman to make the conveyance, although subsequent remainders are limited. If there is a subsequent remainderman in

¹ *Tipping v. Pigot*, 1 Ab. Eq. 385.

² *Else v. Osborn*, 1 P. Wms. 387.

³ *Platt v. Sprigg*, 2 Vern. 303.

case, it seems, the trustees will be required to give security for his interest; if not, the fact that the parents, to whose future children subsequent remainders are limited, are still living, will not be regarded. The most common case in which such decree is made, is where the first remainderman is about to contract an advantageous marriage, and a new settlement of the estate becomes necessary for this purpose; more especially if the effect will be to preserve the estate in the family.

10. A was tenant for ninety-nine years, if he should so long live, remainder to trustees and their heirs for his life, to support contingent remainders; remainder to his first and other sons in tail male; remainder to trustees for years, to raise portions for daughters, if there were no issue male. A having a son, who was of age and about to marry, and also a daughter, and the mother being still alive, the father and son brought a bill in Equity, to have the trustees join in making an estate, in order that a recovery might be had, for the purpose of making a marriage settlement. Decreed, that the trustees should join in the recovery, upon giving security for the daughter's portion.¹

11. So, also, it is said, Chancery will order trustees to join in defeating contingent remainders, upon the application of creditors, where such remainders were limited by a voluntary settlement.²

12. There are many cases, however, where the Court of Chancery has refused to order trustees for preserving contingent remainders to join in barring them. And it may refuse so to order, although, if the trustees actually joined, they would not be chargeable with a breach of trust; because, in settling this point, the reasons and motives only of the trustee would be taken into view.³

13. Lands were limited to husband and wife for life, remainder to a trustee to preserve, &c., remainder to their first and other sons in tail. Twelve years after the marriage, having had no children, the husband and wife brought a bill, praying that they might be enabled to sell the land for payment of the husband's debts. The trustee did not object, upon condition of being indemnified. Held, the Court would still regard the possibility that children might be born, and the application was refused.⁴

14. Limitation to A for ninety-nine years, if he should so long live, remainder to trustees for his life to preserve, &c., remainder to his wife, remainder to the first and other sons in tail male. The wife having died, and there being two sons, B and C, A and B (who was of age) covenanted with D, to whom A had mortgaged the land, that they would suffer a recovery, and procure the trustees to join. The latter refused. Upon a bill by D against A, B and C, praying specific performance, and that the trustees might join; the bill was dismissed,

¹ *Frewin v. Charlton*, 1 Abr. Eq. 386. (*Winnington v. Foley*, 1 P. Wms. 536).

² *Fearne*, 331. 2 Cruise, 342-3.

³ *Woodhouse v. Hoskins*, 3 Atk. 22.

⁴ *Davies v. Weld*, 1 Abr. Eq. 386.

because C did not consent, and the conveyance would operate, not to preserve the estate in the family, as in some other cases, but to pass it to strangers.¹

15. A father devised to A, his eldest son, for ninety-nine years, if he should so long live, remainder to trustees during A's life, to preserve, &c., remainder to A's first and other sons in tail male, remainder to B, a second son, for ninety-nine years (as above), remainders over. The will empowered his sons to revoke these uses, and appoint new uses, provided they limited them to their sons for ninety-nine years, and in strict settlement; with other powers and directions, tending to preserve the estate in his family. A died without issue, and B came into possession of the estate, and had an only son, C, who was of age. B borrowed money, for which B and C became bound; and afterwards B and C covenanted to convey the estate to the creditors, in trust to sell, pay their debts, and restore the surplus to B. The creditors bring a bill against B and C for specific performance, and against the heir of the surviving trustee to preserve, &c., praying that he might join in conveying. Held, the power of revocation in the will showed the testator's intent to make a strict settlement, and keep the estate in his family; that the inconveniences of having an estate for years instead of a freehold vested in B, as tending to a perpetuity, were balanced by the advantage of preventing an alienation by B, in which, if he had the freehold, he might compel the son, who was of course greatly under his control, to join; that the probable object of thus limiting the estate was to avoid the danger of the son's becoming bound for the father's debts; that the proposed conveyance was not designed to effect a marriage settlement, or to pay the debts of C, or justified by any peculiar misfortune in the family; and that C, being only a remainderman, with no vested freehold, was not to be considered owner of the estate, with power over the rights of other remaindermen.²

16. It is said that it would be a dangerous experiment for trustees in any case to destroy remainders, which they were appointed to preserve. In a late case,³ Lord Eldon remarked, that the act which they were decreed to do, should be such as they ought to do. The proposition, that trustees are never to join without direction of the Court, is the result of great caution, but amounts to this, that the Judges of the Court of Chancery are the trustees to preserve all the contingent remainders in the country, and no one could say what was to be done, till a decree had been obtained. But this principle cannot be sustained.

17. Trustees to preserve a contingent remainder, limited after the

¹ *Townsend v. Lawton*, 2 P. Wms. 379.

² *Woodhouse v. Hoskins*, 3 Atk. 22. (*Barbard v. Large*, Amb. 774. 2 P. Wms. 674 n).

³ *Pye v. Gorge*, 2 P. Wms. 684. *Moody v. Walters*, 16 Ves. 283.

death of the particular tenant, during his life, are tenants *pour autre vie*. Hence they cannot maintain the action of waste, which lies only for the owner in fee. But, on the other hand, as their office is to *preserve* the contingent estates, they are bound to preserve the inheritance as entire as possible; which inheritance consists of the land, timber and mines. Hence they may undoubtedly bring a bill in Chancery for an injunction to stay waste; and, if they consent to the felling and sale of timber, join with the tenant for years and the ultimate remainderman in fee in an agreement therefor, by which the proceeds are to be equally divided between them, and expressly covenant to bring no bill for injunction; they are clearly liable for a breach of trust, as for an alienation of part of the inheritance. The tenant for years and remainderman in fee are also liable, having notice of the breach of trust and reaping the benefits of it. If it is a breach of trust, and the trustees convey the estate, a Court of Equity is not to sit still, and let others profit by the spoil.¹ And these parties are equally liable, whether the trustee commits any positive act, or is merely guilty of *laches* in not performing the trust, and bringing a bill for injunction.

18. Upon these grounds, where waste has been committed by the particular tenant and the remainderman in fee, and the timber sold, and after the death of the former the estate vests in his son, to preserve whose remainder trustees were appointed; the son may maintain a bill in Equity against the remainderman in fee for restitution of the amount which he received from the sale, although the waste was committed when the plaintiff had neither *jus in re* nor *jus ad rem*, before he was in *rerum natura*. If timber were blown down by accident, or cut by a stranger or by the tenant for life alone, it seems, the property of it would vest in the remainderman in fee. This is a legal right, with which Equity will not interfere. But wherever a legal right is acquired or exercised by fraud or collusion contrary to conscience, Equity will enjoin it or decree compensation. Hence in this case it will interfere, on account of the mutual agreement between the tenant for life and the remainderman.²

¹ Per Lord King, *Mansell v. Mansell*, 1 P. Wms. 678. 2 Abr. Eq. 747.

² *Garth v. Cotton*, Dick. 183.

CHAPTER XLIX.

REMAINDER—DOCTRINE OF ABEYANCE. CONDITION OF THE FEE, IN CASE OF CONTINGENT REMAINDERS.

1. Limitation to uses—use results.
4. Limitation by devise.

10. Limitation by common law conveyance.

1. WHERE a remainder of inheritance is limited in contingency by way of use, the inheritance, in the mean time, if not otherwise disposed of, remains in the settler or grantor, till the contingency happens. This point has been already considered to some extent, under the head of *Uses and Trusts*.¹ (pp. 217–8).

2. A feoffment was made, to the use of the feoffor for life; afterwards, of such tenants to whom he should demise any part of the land for years or for life; afterwards, to the use of the performance of his will, and of the devisees of any estate in the land; after such performance, to the use of successive tenants in tail; and lastly, to the use of him and his heirs. Held, nothing vested till the death of the feoffor, because he had power to devise even in fee.²

3. Feoffment in fee, to the use of A in tail, remainder in fee to the right heirs of B, who is living. The fee simple is neither in abeyance nor in the feoffee; but the use in it results to the feoffor, and remains in him till the death of B.³

4. So, where a contingent remainder is *devised*, the fee descends to the heir; and even though a precedent estate for life is given to him, he takes such estate and the fee distinctly, in relation to the contingent remainderman, so that when the contingency happens, the heir's estate opens to let in the remainder.⁴

5. So, where a contingent remainder in fee is devised to the heirs of the testator, preceded by other contingent remainders, one of which is in fee, the heirs take the inheritance by descent.

6. A testator devised to his wife for life, if she should have a son, and call it by his name; then he gave the inheritance to such son; and, if he died under twenty-one, then to his own heirs. The heir of the testator conveyed in fee to the testator's widow. Held, as the fee was not in abeyance, but descended to the heir, the contingent remainder to the son was hereby destroyed.⁵

¹ 2 Cruise, 385. 6 Rep. 18 a.

² Davis v. Speed, Carth. 262.

³ Puresfoy v. Rogers, 2 Saun. 380. 1 P. Wms. 511.

⁴ Leonard, &c. 10 Rep. 78.

⁵ 2 Cruise, 386. Fearn, 525.

7. The doctrine above stated, however, has been denied in some cases. Thus, Sir J. Jekyll remarked, that though, in case of a devise for life, remainder to the heirs of one still living, the remainder in fee is in abeyance, yet there is a *possibility* left in the heir. That this was plain even in case of a grant, where a possibility is left in the grantor, entitling him to enter for a forfeiture by the particular tenant, which terminates his estate as much as his death; and that it was absurd that a tenant for life should have power by an unlawful act, in destroying the contingent remainder, himself to acquire the fee. It was like the possibility, that was upon a grant at common law to a man and the heirs of his body; for there, though the grantor had no reversion, he might enter upon failure of issue.¹

8. The decision of Sir J. Jekyll, however, in the case referred to, was reversed on appeal by Lord Parker. He remarked, that the only possible ground for treating the fee as in abeyance, or “in gremio legis,” was the preservation of the contingent remainder; whereas the effect of this principle was, not to preserve, but to destroy it, by enabling the particular tenant to make a wrongful conveyance, which would defeat the remainder, if contingent.

9. In another case, however, Lord Talbot seemed to recognise the principle, that the fee is in abeyance, where a contingent remainder is limited by devise. The question having arisen, whether two persons, to whom an estate was devised, *and to the heirs of the survivor*, in trust to sell, could make a good title, the remainder in fee being contingent; it was proposed that the devisors’ heir at law should join in the deed. But Lord Talbot remarked, that this would be of no avail, except as supplying a want of probate of the will, because *the fee was in abeyance*.² But Mr. Fearne attaches little weight to this incidental opinion, and thinks the contrary doctrine is now firmly established by a series of cases.³

10. Where a contingent remainder in fee is limited neither by devise nor by way of use, but by *common law conveyance*, the opinion has prevailed, that, although the fee does not vest in any grantee, yet it passes out of the grantor, leaving him no estate whatever. It has been sometimes held, however, that, although the grantor retains no estate, yet there remains in him a *possibility of entry*, by which, upon a forfeiture by the particular tenant, he may regain his title. Mr. Fearne is of opinion, that nothing passes out of the grantor, except the particular estate, until the contingency happens. Thus, where a conveyance is made to A, remainder to the right heirs of B, and A dies before B; the remainder becoming void, the grantor’s estate re-

¹ Carter v. Barnardiston, 1 P. Wms. 511.

² Vick v. Edwards, 3 P. Wms. 372.

³ Fearne, 525.

vests in him.¹ But Chancellor Kent says,² that, though the good sense of the thing, and the weight of liberal doctrine, are strongly opposed to the ancient notion of an abeyance, the technical rule is, as at common law, that *livery of seisin* takes the reversion or inheritance from the grantor, and leaves him no tangible or disposable interest. Instead of a reversion, he has only a *potential ownership*, subsisting in contemplation of law, or a *possibility of reverter*. Mr. Preston³ and Mr. Cornish⁴ also are of opinion, that the common law rule is still in force, and the latter remarks that it was never shaken or attacked, until Mr. Fearn brought against it the weight of his eloquence and talents.

11. Chancellor Kent expresses the opinion,⁵ that, as conveyances in this country are almost universally *by way of use*, the question as to the abeyance of the fee will rarely occur; in other words, they are subject to the same rule, already stated as applicable, in England, to those conveyances which are nominally or ostensibly made to uses; and that portion of the estate, limited as a contingent remainder, continues in the grantor till the contingency happens. But in New York, where by the Revised Statutes all conveyances are to be deemed *grants*, which is a common law mode of transfer, Chancellor Kent is of opinion that the doctrine of abeyance is in force. How far the latter remark is applicable in other States, and whether conveyances by deed, though designated by names which in England denote limitations to uses, such as bargain and sale, &c., are to be treated as such in effect; or whether, as is often expressed, they are to be regarded as a substitute for *feoffment*, and in most respects to have the same operation with the latter; are questions which may be considered hereafter.*

¹ Co. Lit. 342 b. 1 P. Wms. 515. Fearn, 526. 2 Rolle's Abr. 418. Vin. Abr. Remainder, (1).

² 4 Kent, 259.

³ 1 Prest. on Est. 255. 2 Prest. on Abst. 103-6.

⁴ Cornish, 117.

⁵ 4 Kent, 257, and n.

* See *Deed, Feoffment*.

CHAPTER L.

REMAINDER. ALIENATION, ETC. OF CONTINGENT REMAINDERS.

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| 1. Vested remainders alienable, &c. | 15. Transfer to creditors. |
| 2. Contingent remainders said to be descendible and devisable. | 16. General remarks. |
| 10. Cannot be conveyed at law, but may be in equity, and may pass by <i>estoppel</i> . | |

1. It has been already stated, (p. 364), that vested remainders are, for the most part, subject to the same rules of law as vested estates in possession. Like the latter, they are transmissible, either by act of law, or by act of the remainderman himself. Thus, a vested remainder descends to heirs, may be conveyed or devised, and is in general liable to be taken by creditors.

2. With regard to contingent remainders, the general principle laid down by elementary writers is, that all contingent estates of inheritance, *where the person to take is certain*, are transmissible by descent, and devisable. To this point, so far as it relates to heirs, Mr. Cruise cites the following cases.¹

3. A made a feoffment to the use of himself for life; after the death of himself and his wife, to the use of B, his son, for life, then to the wife of B, and her issue by him; remainder over; remainder to the heirs of B. B, having issue a daughter, leased for a long term, made a fine to the lessee for the same term, and died in the lifetime of A. Held, though A took but a contingent remainder, yet this descended to his heir, so far that the latter, after the contingency happened, was bound by the fine.²*

4. So a contingent use descends to heirs. Thus, it is laid down in Shelley's case, that where A covenants with B, that, upon a certain contingency, he will stand seised of certain land to the use of the latter, who dies, and then the contingency happens; although B had neither a right, title, use nor action, but only a possibility of an use, which could neither be released nor discharged, yet his interest descended to his heir.³

5. But where the circumstances seem to make the existence of the

¹ 4 Kent, 261. Fearn, 459. 2 Prest. on Abstr. 119. 2 Cruise, 296-8. Doug. 753.

² Weale v. Lower, Pollex. 54.

³ Wood's case, 1 Rep. 99 a.

* This case directly decides, rather that a contingent remainder may be barred as against the heir, even if it does descend, than that such remainder is actually descendible.

contingent remainderman a part of the contingency itself, upon which the remainder is to vest ; his interest will not pass to his heirs.¹

6. Conveyance by husband and wife of her lands, to the use of her for life, remainder to him for life, if they should have any issue that should so long live, remainder to all such children in fee, as tenants in common ; if the wife should die without issue, or all such issue should die under twenty-one, then, as to one moiety, to the husband in fee. The husband died before the wife. Held, nothing passed to his heirs.²

7. The principle above stated, both in regard to descent and devise of contingent remainders, is recognised in the case of *Roe v. Griffiths*,³ where Lord Mansfield remarks, that in all contingent, springing and executory uses, where the person who is to take is certain, *so that the same may be descendible*, they are also devisable. So, in the case of *Barnitz v. Casey*,⁴ in the Supreme Court of the United States, it is said that a contingent remainder or executory devise descends to heirs, but with the qualification, that it shall vest in him who is heir to the first devisee when the contingency happens.* So, in *Driver v. Frank*,⁵ although the point seems to be treated as if it were or had been doubtful, Ch. J. Gibbs says, "it cannot be disputed that generally a contingent remainder is transmissible."

8. A devised in trust for his son B, and, if he should die without issue, under age, then that all his estates should go to C, his heirs and assigns. C afterwards devised all his estates in possession, remainder or reversion, and died, living B, who subsequently died under twenty-one, and without issue. Lord Chancellor Northington said, "I have never had any doubt, since I was twenty-five years old, that these contingent interests are devisable, notwithstanding some old authorities to the contrary."⁶

9. A covenanted with B, that his son should marry the daughter of B, and if not, that A and his heirs would stand seised of certain land to the use of B and his heirs, until £100 should be paid. B died, and the marriage never took place. Held, the heir of B should have the land.⁷

10. In England, though a contingent remainder will not pass by a legal conveyance, yet it may pass by estoppel, fine or recovery, so as to bind the heir, when the contingency happens, after the death of the original remainderman. And such remainder is assignable in Equity.⁸

11. Thus, in *Weale v. Lower*, (*supra* s. 3), it being decided,

¹ *Fearne*, 364.

² *Moorhouse v. Wainhouse*, 1 Black. R. 638.

³ 1 Black. R. 605.

⁴ 7 Cranch, 469.

⁵ 6 Price, 53.

⁶ *Moor v. Hawkins*, 1 H. Bl. 33-4.

⁷ *Rector of Chedington's case*, 1 Rep. 155 b.

⁸ 2 Cruise, 393. *Doe v. Martyn*, 8 Barn. & Cr. 516.

* See *Reversion, Descent*.

that the remainder, whether vested or contingent, came to the heir of A *by descent*, not as a purchaser; it was further held, that as C would have been bound by the lease *by estoppel*, upon the vesting of his estate, supposing it to have been contingent when the lease was made, so his heir was bound in like manner.

12. Devise to A for life, remainder to his first and other sons in tail. A and B, his eldest son, joined in suffering a recovery, and declaring uses of the estate. Afterwards B died, and C, a second son, undertook to create a charge upon the land, by a deed reciting his contingent and reversionary estate therein. A died, having devised to B a life estate in the land. Held, although at the time of attempting to charge the land, C had no interest in it, yet his interest, subsequently acquired under the will, was bound by his deed, by estoppel.¹

13. Upon a marriage settlement, a rent was created to the use and intent, that the heirs of the body of the wife and their heirs should receive such rent; and subject thereto, the land was limited to the husband and his heirs. There were two sons of the marriage, who, living the father and mother, conveyed the rent by deed. The estate was the father's. Held, the sons had not, at the time of selling, an actual possibility; the rent might never arise, or, if it did, the sons might not be heirs of the mother's body at her death. Nothing, therefore, passed by the deed. A fine would have operated by estoppel.²

14. In a late case,³ it is said, by Bayley J., that a fine by a contingent remainderman passes nothing, but leaves the right as it found it; that it is, therefore, no bar when the contingency happens, in the mouth of a stranger, against a claim in the name of such remainderman; that it operates by estoppel, and by estoppel only, and that parties or privies may avail themselves of that estoppel, but parties or privies only. But the same learned Judge, in a still later case,⁴ qualifies his former opinion by saying, that such fine, besides operating by estoppel, has an ulterior operation when the contingency happens; that the estate, which then becomes vested, feeds the estoppel, and the fine operates upon it as though it had been vested when the fine was levied.

15. In England, a contingent remainder may be validly transferred to creditors. It may still be defeated by the particular tenant; but if the original remainderman afterwards regains an interest in the estate by the act of such tenant, the Court of Chancery will subject it to the claim of the creditors.⁵

16. The concurrent opinions of elementary writers, and the cases to which they refer, seem to settle the principle, that contingent remainders are both descendible and devisable. It will be perceived,

¹ *Bensley v. Burdon*, 2 Sim & Stu. 519.

² *Whitfield v. Faussett*, 1 Ves. 391. (But see *Wright v. Wright*, 1 Ves. 411).

³ *Doe v. Martyn*, 8 Barn. & Cr. 597.

⁴ *Doe v. Oliver*, 10 Ib. 187.

⁵ *Noel v. Bewley*, 3 Sim. 103.

however, that the establishment of this doctrine at one destroys a very important, perhaps the most important, distinction between vested and contingent remainders. There is but one other point of view, in which the question would be likely to be raised for judicial decision, whether a remainder was vested or contingent; and that is, the power of a preceding tenant to destroy the latter and not the former. Many of the numerous cases upon this subject have turned upon this latter question; but I think it will be found, on examination, that many others have turned upon the point, whether a remainder had or had not passed, or might or might not pass, to the representatives of the remainderman after his death; and that this question has been treated, as involving, or involved in, the further inquiry, whether the remainder was vested or contingent. In other words, it has been *taken for granted*, that if a remainder is transmissible, it is, of course, vested; if not transmissible, it is, of course, contingent. One of the cases already cited, viz. *Barnitz v. Casey* (supra, s. 7), although recognising the doctrine, that a contingent remainder descends, yet, by stating in *what manner* it descends, seems to negative or greatly qualify the general proposition; for such remainder passes not to the heir of the contingent remainderman at his death, but to the person who is heir to him at the time the contingency happens.* This remark, of course, can have no possible applicability to a vested estate or a vested remainder, which, upon the death of the owner in fee, must pass at once to his *then* heirs. So, in the leading case already cited, of *Smith v. Parkhurst*, (pp. 367-8), Chief Justice Willes, in his elaborate opinion delivered to the House of Lords, urges, as one of the most convincing reasons for regarding the remainder, limited to trustees *and their heirs*, as vested and not contingent; that, upon the latter construction, it could not descend to heirs, though they were expressly named.† So, in the case of *Doe v. Provoost*, (supra, ch. 42, s. 51), the decision, that the remainder actually vested in the children of A, during her life, was founded in part at least upon the consideration, that otherwise it could not descend to grandchildren, and thus the testator's intentions in their favor would be defeated. The same ground of decision is recognised in the case of *Wager v. Wager*, (supra, ch. 42, s. 53). So in *Jackson v. Durland*, (supra, pp. 376-7), it is said, "B had a vested interest in possession on the death of the widow. B was the object of the testator's bequest; and he never

* Thus, a life estate is limited to A, with a contingent remainder to B and his heir; B dies, living A, and leaves two nephews, C and D, his heirs at law. C dies, leaving children, and then A. D, upon A's death, takes the whole estate, and C's children nothing.

† The manner of the Chief Justice's argument upon this point is confident, sarcastic, almost scornful. "Will any one say that any thing can descend to the heir, that did not vest in the ancestor? So that, if nothing vested in the trustees, the limitation to them and their heirs is nonsensical."

meant that the remainder should be contingent until he came of age, so that, if he married in the mean time and died, *his children could not inherit.*" And in *Doe v. Perryn*,¹ Buller J. assigns as the strong reason for construing a remainder to be vested, if possible, that otherwise, where it is limited to children, it would not pass after their death to grandchildren. The same ground is recognised in *Boraston's case*, (*supra*, p. 375), and in several others, which it is needless to enumerate. I trust that those cited will excuse me from the charge of presumption, when I express my surprise, that the *transmissibility* of contingent remainders by descent (to say nothing of devises) has been stated by so many distinguished writers, as a well settled and clear point. Nor does it seem to me, that the conflict of authorities is fully reconciled, by the qualification ordinarily annexed to the statement of this rule, viz. that such remainders descend "*where the person to take is certain.*" It would seem a self-evident proposition, that where the person to take is *uncertain*, a remainder cannot descend. Thus, where a conveyance is made to A for life, remainder to the right heirs of B, this is a contingent remainder by reason of *the uncertainty of the person*. In other words, *there is no person*, answering to the description of "heirs of B." "*Nemo est hæres viventis.*" Unless, therefore, a kind of personality is given to *nemo*, it is idle to say that such remainder cannot descend, since the law recognises no one who can stand in the capacity of ancestor. Still, some of the cases may perhaps be explained by the circumstance, that, although the remainder was contingent, yet the person who should take was ascertained; or, in the language of Wilde J. in the case of *Clapp v. Stoughton*,² that there was "*a vested right, subject to a contingency, which was transmissible to heirs, and became vested in possession in them on the forfeiture of the estate*" by the prior tenants. This seems to be substantially a repetition of Chief Justice Willes' doctrine already referred to (p. 368), of a distinction between contingent remainders which do vest, and contingent remainders which do not vest.

¹ 3 T. R. 494-5.

² 10 Pick. 468. (*supra*, ch. 42, s. 43).

CHAPTER LI.

REMAINDERS IN NEW YORK.

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| 1. Expectancies. Remainders vested and contingent. | 13. Remainder not barred by destruction of prior estate. |
| 6. Fee upon a fee. | 14. Not void for improbability. |
| 7. Remainder after estate tail. | 15. Remainder to heirs. |
| 8-18. Remainder after estate for life or for years. | 16. Contingency may abridge prior estate. |
| | 17. Limited application of the Statute. |

1. IN New York, *expectancies* are divided into *future estates*, or those which are to commence at a future day, and *reversions*. A future estate may be limited, either without any precedent estate, or after the termination of such estate. In the latter case, it may be called a *remainder*.¹

2. A remainder is defined to be "an estate limited to commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate created at the same time."²

3. A *vested* remainder is when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. Or it is where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to possession, upon the ceasing or failure of all precedent estates, provided the estate limited in remainder continues; or where a remainder cannot be defeated by third persons, or contingent events, or failure of the condition precedent, if the remainderman lives and the estate limited to him continues, till all the precedent estates are determined.

4. A remainder is *contingent*, whilst the person to whom, or the event upon which, it is limited to take effect, remains uncertain. Or it is, where there are other uncertainties besides the remainderman's living and the continuance of his estate, though he be living and ascertained at the time. But a remainder is not contingent, where it is limited to a whole class in being, though accompanied with a power of appointment to a part of such class; until such appointment is made, it vests in the whole.³

5. A remainder is *contingent*, where, before it can take effect, trustees are to make an appointment with reference to moral character, at the time of vesting in possession.⁴

¹ 1 N. Y. Rev. St. 723.

² *Ibid.* Hawley v. James, 5 Paige, 318.

³ *Ibid.*

⁴ *Ibid.*

6. A contingent remainder in fee may be limited on a prior remainder in fee, to take effect in case the first remainderman dies under age, or upon any other contingency by which his estate may terminate before he comes of age. So a fee may be limited upon a fee, upon a contingency, which must happen, if at all, within the period of two lives in being at the creation of the estate.¹

7. Remainders may be validly limited upon every estate which, under the English law, would be adjudged an estate tail. These take effect as conditional limitations upon a fee, and vest in possession on the death of the prior tenant, leaving no issue.²

8. No remainder, except a fee, can be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate; nor can a remainder be created upon such estate in a term for years, unless it be for the whole residue of such term; nor can a remainder be made to depend upon more than two successive lives in being; and if more lives be added, the remainder takes effect upon the death of the first two persons named.³

9. A contingent remainder cannot be created on a term for years, unless the nature of the contingency is such, that the remainder must vest in interest during not more than two lives in being at the creation of the remainder, or upon the termination thereof.⁴

10. No estate for life can be limited as a remainder on an estate for years, except to a person in being at the creation of such estate.⁵

11. A freehold estate, as well as a chattel real, (to which these regulations equally apply) may be created to commence *in futuro*; and a life estate may be created in a term of years, and a remainder limited thereon; and a freehold or other remainder, either contingent or vested, may be limited upon an estate for years.⁶

12. When a remainder on a life estate or a term for years is not limited on a contingency defeating or avoiding the prior estate, it shall be construed as intended to take effect only on the death of the first taker, or the natural expiration of the term.⁷

13. No expectant estate shall be defeated or barred by any alienation or other act of the prior tenant, or by any destruction of the prior estate by disseisin, forfeiture, surrender, merger or otherwise, unless in some mode authorized by the party who created the estate.⁸

14. No future estate, otherwise valid, shall be void, on the ground of the probability or improbability of the contingency on which it is limited to take effect.⁹

15. Where a remainder is limited to the heirs or heirs of the body of a person to whom a life estate is given, the persons who, on the

¹ 1 R. St. 723-4.

⁴ *Ib.*

⁷ *Ib.* 725.

² *Ib.* 722.

⁵ *Ib.*

⁸ *Ib.*

³ *Ib.* 724.

⁶ *Ib.*

⁹ *Ib.* 724.

termination of the life estate, are the heirs of the tenant for life, take as purchasers.¹

16. A remainder may be limited upon a contingency, which operates to abridge or defeat the prior estate; and such remainder shall be construed as a conditional limitation.²

17. The provisions above-named do not affect vested rights, or the construction of deeds or instruments, which took effect prior to January 1, 1830.³

18. Upon a devise to A for fifty years, as an absolute term, remainder to B for life if he should marry C, remainder to the children of such marriage; the remainder to B is contingent, but cannot vest after his death, and fails by that event if it happen within the term. The ultimate remainder must vest, if ever, within the period of one life in being at the testator's death. The first child would, upon its birth, take a vested interest in the ultimate remainder in fee, subject to open and let in after-born children.⁴*

CHAPTER LII.

REVERSION.

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| <ol style="list-style-type: none"> 1. Definition and principle of the estate. 3. An incorporeal hereditament. 4. After conditional fee, &c. 5. After base fee. 6. After estate for years. 7. May belong to a particular tenant, who underlets. 8. Created by act of law. 9. Subject to same rules with estates in possession. | <ol style="list-style-type: none"> 10. Actions by reversioner for injuries to the land. 21. Rights of reversioner in case of adverse possession. 27. Reversion, how far liable for debts. 34. Transfer of reversion—when set aside. 45. Miscellaneous provisions. |
|---|--|

1. A REVERSION is either the residue of an estate left in a grantor, to commence in possession after the termination of some particular estate which he has conveyed; or the residue of an estate which descends to heirs, subject to some particular devise, or some temporary interest created by act of law. Thus, if the owner in fee grant an

¹ 1 R. St. 724.

² *Ib.* 725.

³ 1 N. Y. Rev. St. 750.

⁴ *Marcellis v. Thalkimer*, 2 Paige, 35. *Hawley v. James*, 4 Kent, 251 n.

* New York is almost alone in legislation upon the subject of remainders. In Mississippi, an act provides that no remainder shall be affected by an alienation, or union with the inheritance, of the particular estate (*Missi. Rev. C. 458*). This is the only statutory provision that I have been able to find on the subject, which seems to require notice.

estate for life, the reversion of the fee is, without any special reservation, vested in him by act of law. So, if an owner in fee devise an estate to one for life, or if the owner's widow is endowed from his land, his heirs are owners of the reversion.

2. This estate is founded upon the principle, that where the owner of land creates a limited or particular estate therein, he retains all the interest in the land, which he has not expressly parted with. Thus, if one convey to A, remainder to B, with any number of remainders over, less than a fee; he retains the fee himself as a reversion.

3. A reversion is said to be an *incorporeal* hereditament, and therefore, in England, may be conveyed by grant, without livery of seisin. The more usual method of transfer is a lease and release or bargain and sale.¹

4. At common law, where a man conveyed a *conditional* fee, no reversion or actual estate remained in him, but the grantee took the entire estate, leaving only a *possibility of reverter* in the grantor, upon failure of the condition. But it is now settled, though once doubted, that an *estate tail* is a *particular* estate, carved out of the fee simple, and leaves a reversion in the grantor.²

5. No reversion remains upon a *base* or *qualified fee*; because no valid remainder can be limited upon such estate.

6. It is said, that where the owner in fee makes a lease for years, he has no reversion till the lessee enters, upon the ground that before entry the lessee does not complete his estate. But when an estate for years is created by any conveyance deriving effect from the Statute of Uses, as the lessee immediately has the legal possession, a reversion immediately vests in the lessor. This subject has been already considered under the title of *Estate for Years* (p. 120).³

7. Where one, having a limited or particular interest in land, conveys to another a smaller interest than his own, he thereby acquires a reversion to himself. Thus, where tenant in tail leases for life, or a tenant for ninety-nine years, for this period, less one day, he becomes a reversioner. So, in England, where land is taken by the legal process of *elegit*, &c., to be held by the creditor till his debt is satisfied, the debtor has a reversion.⁴

8. A reversion is never created by deed or writing, or by *act of party*, but always arises from construction of law. And where an estate is expressly limited, though under the name of *remainder*, in the same way in which it would pass by law as a *reversion*; it will be construed as the latter, not the former, interest. Thus, if one conveys for life or in tail, remainder to *his own right heirs*; he still retains the reversion in fee. So, if one conveys in fee, to the use of himself for life, then to the use of A in tail, then to the use of his own right heirs,

¹ 4 Kent, 354 and n.

² Co. Lit. 46 b. 2 Cruise, 300.

³ Plow. 248. Lit. s. 18, 19.

⁴ Co. Lit. 22 b.

a reversion in fee remains in him by way of resulting use.¹ (See p. 367).

9. A reversion, like a vested remainder, though not to take effect in possession *in presenti*, but only *in futuro*, is still an immediate fixed right of future enjoyment; and subject to most of the rights and liabilities incident to estates in possession. Hence, many of the following remarks may be regarded as alike applicable to reversions and to vested remainders.

10. A reversioner may maintain an action for any injury done to the inheritance. Thus, where an action was brought by a reversioner for obstructing his lights, Lord Mansfield held, that the tenant might sue, and the reversioner also, as the injury would affect the price of the estate, if the latter should be disposed to sell it.²

11. So, one having a reversionary interest in real property, may maintain an action against one who wrongfully removes fixtures therefrom.

12. A, being the owner of a factory and the machinery in it, gave bond to B, to convey them to him, on payment of certain notes, given by B for the price; B to have possession of the property until he failed to pay the notes at maturity. Possession was delivered accordingly. Before maturity of the first note, a creditor of B attached the machinery, and the officer removed it, having notice of A's title, and afterwards sold it upon execution. A brings an action against the officer, declaring both in trover and in case. Held, although, if B had himself removed and sold the machinery, this might have been regarded as so putting an end to the contract, and revesting the possession in A, as to justify an action of trover against the purchaser; yet the attachment, made by the creditors of B, being *in invitum*, might not have the same effect: but that the action of trespass on the case was clearly sustainable.³

13. In this case, the amount of damages recovered was three times the sum for which the property was sold by the officer. Held, the verdict should not be set aside for excessive damages.⁴

14. Where, as is the case in New York, a statute gives to a reversioner or remainderman "an action of *waste* or *trespass*, notwithstanding any intervening estate for life or years;" this does not authorize a plaintiff to bring either of these actions at his election, but merely to bring that form of action which is appropriate to the particular case that occurs—that is, waste against the tenant himself, and trespass against a stranger.⁵

15. A reversioner may bring an action on the case *in nature of waste* against a stranger, for ploughing up his ground and carrying away the turf thus obtained. Unlike a bare wrongful entry on land,

¹ Co. Lit. 22 b.

² Ayer v. Bartlett, 9 Pick. 156

³ Livingston v. Haywood, 11 John. 429.

⁴ Jesser v. Gifford, 4 Burr. 2141.

⁵ Ib.

or mere outrage on the possession of the tenant, for which he might be compensated in the action of trespass, these are permanent injuries, and entitle the reversioner to damages. And these damages he is not bound to recover from the tenant, but may have his action against the wrong-doer himself.¹

16. For acts which merely affect injuriously *the possession* of the land, a reversioner can maintain no action.* Hence the declaration, in an action brought by a reversioner, must either expressly allege the act to have been done to the injury of his reversion, or must state an injury of such permanent nature as to be necessarily prejudicial to the reversion. Therefore, where the plaintiff declared as reversioner of a yard and part of a wall occupied by his tenant, and that the defendant placed on said part of the wall quantities of bricks and mortar, and thereby raised it to a greater height than before, and placed pieces of timber on the wall, overhanging the yard, by which the plaintiff during all the time lost the use of said part of the wall, and also by means of the timber, &c. overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and said part of the wall have been injured, without stating that his reversion was injured; the judgment was arrested after verdict.²

17. Where, by virtue of special provisions in a lease, the lessee has the right to do certain acts in relation to the land, which would otherwise be a ground of action against him by the lessor, it seems the lessor can maintain no action against a stranger for doing such acts, or at most can recover only nominal damages.³

18. A demised land to B for years at an annual rent, with liberty to dig half an acre of brick earth annually. B covenanted that he would not dig more; or, if he did, that he would pay a certain increased rent, being after the same rate that the whole brick earth was sold for. A stranger dug and took away brick earth, and the lessee brought trespass, and recovered full damages against him. Held, B was entitled to retain the whole damages. Chief Justice Mansfield remarked, that the terms of the lease gave the lessee the same right as the lessor, a right to dig and sell the brick earth. The lease amounted to an absolute sale of the whole brick earth, though the tenant was not to pay for the whole, unless he used it. The lessor could take none of it. For all that he took, the lessee might recover full damages. And the lessor could not, it seems, have an action of waste against the lessee, but might sue him upon the covenant, as if the brick earth had been expressly sold, it having been taken with the lessee's knowledge. He proceeds to remark, it is not necessary to prejudge the question, whether the lessor can sue in this case. But I have great difficulty

¹ Randall v. Cleaveland, 6 Conn. 328.

² Jackson v. Peaked, 1 M. & S. 234.

³ Atterwell v. Stevens, 1 Taunt. 182.

* They do not stand in the relation of *principal and agent*. Stark v. Miller, 3 Mimmo. 470.

in finding out how the lessor can be injured. If he has any right, it must be for mere nominal damages. Heath J. remarked, that the lessor could not recover damages for the removal of the soil, for that is sold to another; but only for any damage possibly done to the inheritance, if such there be, in the manner of the excavation. Chambre J. dissented, on the ground that the right of the lessee was executory merely; that he acquired no freehold in the soil, till he himself elected to become a purchaser of it; and till such election, he had a mere possessory right, his interest being the difference between the value of the earth taken by the defendant, and the price that the lessee must have paid for it if he had taken it himself, and all the remaining interest being in the reversioner, who might bring an action on the case against the wrong-doer.

19. Where a third person does acts which are in their nature permanently injurious to the estate, as, for instance, by cutting down trees, but by the license of the lessee; he is not a *stranger*, within the meaning of the New York Statute, which gives to a reversioner, &c. an action of trespass for an injury to his estate done by strangers. The mere want of privity of contract between the wrong-doer and the lessor, does not constitute the former a stranger; because this construction would authorize an action against every servant or laborer, in the employment of a tenant, who should do an act injurious to the lessor. The general rule is, that in a case of this kind, both the lessor and lessee may bring their respective actions; but in this instance the former could not sue, having expressly authorized the act. The lessee would be answerable in an action of waste. Every act that would be a trespass in a stranger, is not necessarily waste in the tenant. If the servant of the tenant were liable in trespass to the lessor, he might sometimes be made liable for acts which the lessee might do with impunity. He must therefore be allowed to make the same defence, which the lessee could make to an action of waste. The difficulty which would inevitably result from treating such person as a stranger, could not be avoided without confounding the actions of trespass and waste.¹

20. But it has been held in New Hampshire, that an action on the case for waste lies in favor of a reversioner against a third person, who has cut timber upon the land by virtue of a sale to him by the lessee; the title of the trees, when cut, in all cases remaining in the reversioner; and the tenant being empowered to cut and use them for specific purposes only, but not to sell them.²

21. A remainderman or reversioner, not having any right to immediate possession of the land, cannot lose his title by means of a disseisin, or adverse possession by a stranger. He either cannot, or, if he can, is not bound to, enter during the particular estate, to defeat the wrongful title.

¹ *Livingston v. Mott*, 2 Wend. 605.

² *Elliot v. Smith*, 2 N. H. 430.

22. Judge Kent thus states the law upon this point. Neither a descent cast, nor the Statute of Limitations, will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began; because a right of entry in the remainderman cannot exist during the existence of the particular estate; and the *laches* of a tenant for life will not affect the party entitled. An entry, to avoid the Statute, must be an entry *for the purpose of taking possession*; and such an entry cannot be made during the existence of the life estate.¹

23. So it is said, that where there is a right to *curtesy* in land descended, no right of entry descends to, or can vest in, the heir, during the continuance of that estate.²

24. The Statute does not run against reversioners, &c. during the continuance of the particular estate, even though the latter did not exist at the time the disseisin took place; provided it was immediately preceded by disabilities, such as *infancy*, &c., which prevented a legal entry. The subject of *disabilities* will be considered hereafter.³

25. A tenant for life was disseised, and the disseisor, and those claiming under him by two successive descents, visibly occupied the land for forty years. Held, upon the death of the tenant for life, the reversioner might still assert his title to the land.⁴

26. In Massachusetts, although, as in New York, a reversioner, &c. is not *bound* to enter during the continuance of the particular estate; the language of the Court implies, that he *may* enter. Thus, in a case of alleged forfeiture by the particular tenant, Judge Wilde remarks,—“as to the objection of forfeiture, it is sufficient to remark, that the demandants do not claim a right of entry arising from forfeiture. If a forfeiture were incurred, they were not bound to enter; and if the right to enter for that cause is now barred by the Statute of Limitations, this does not affect the right of entry, arising afterwards, on the death of tenant for life. If there be two rights of entry, one may be lost without impairing the other.”⁵

27. In England, a reversion, expectant upon an estate for years, is present assets for payment of debts. Thus, it is now settled, though there are old precedents to the contrary, that an heir holding such reversion cannot plead the estate for years in delay of execution, upon a suit against him on his ancestor's bond, but must confess assets. The grounds of this doctrine are, that an estate for years, at common law, was an interest not recognised by the law; and that, although an

¹ Jackson v. Schoonmaker, 4 John. 402.

² Jackson v. Sellick, 8 John. 269.

³ Wallingford v. Hearl, 15 Mass. 471.

⁴ Stevens v. Winship, 1 Pick. 327.

⁵ See vol. 2—*Disabilities, Disseisin*.

² Jackson v. Johnson, 5 Cow. 74.

execution may issue upon the judgment against the heir, yet the lessee may defend against an ejectment by the title of his lease.¹

28. A reversion, expectant upon an estate for life, is *quasi assets*. The heir of such reversioner may plead specially the intervening estate, but the plaintiff may take judgment of it *quando acciderit*.²

29. The question, how far a reversion in the hands of heirs is regarded as an actual estate, with respect to its liability for debts as well as in other respects, will be considered hereafter under the title of *Descent*. A single case only, and a few general observations upon the subject, will be here given.

30. A devise was made to one for life, afterwards the estate to be distributed as if no devise had been made. A, one of the heirs of the testator, dies during the continuance of the life estate. The question arose, whether A's heir, after the life estate was determined, inherited to his father or to his grandfather, the testator, and whether A's debts were upon his death to be paid from this reversion, now become possession. Held, at common law, A had a share of the reversion, and might aliene it, or, by an obligation binding *his heirs*, might render the estate assets in their hands. So, if judgment should be rendered against him before his death, execution might issue against the estate after his death. But still, none of these things having taken place, on the determination of the life estate, A's son takes as heir of the testator, and not as heir of A. Therefore, by the common law rule, the reversion would not be liable for A's debts; but by Statute 1783, c. 36, and following acts, reversions are made liable in Massachusetts for debts, under the general denomination of *real estate*. Hence the administrator of A might take the estate as assets.³

31. A very important, perhaps the leading American case, upon this subject, is that of *Cook v. Hammond*,⁴ in the United States Circuit Court. In the course of his learned and able opinion, Judge Story makes the following general remarks.⁵

32. Where the estate descended is a present estate in fee, no person can inherit who cannot, at the time of the descent cast, make himself heir of the person last in the actual seisin thereof; that is, as the old law states it, *seisina facit stipitem*. But of estates in expectancy, as reversions and remainders, there can be no actual seisin during the existence of the particular estate of freehold; and, consequently, there cannot be any mesne actual seisin, which of itself shall turn the descent, so as to make any mesne reversioner or remainderman a new stock of descent, whereby his heir, who is not the heir of the person last actually seised of the estate, may inherit. The rule, therefore, as

¹ 2 Cruise, 302. 1 Salk. 354. 2 Ld. Ray. 753. 7 Mod. 40. 2 Mod. 50. 2 Wils. 49.

² Ibid. Dyer, 373 b.

³ Whitney v. Whitney, 14 Mass. 88.

⁴ 4 Mass. 467.

⁵ Ib. 484.

to reversions and remainders expectant upon estates in freehold is, that unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seised in fee and created the particular estate, or, if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. But while the estate is thus in expectancy, the mesne heir in whom the reversion or remainder vests, may do acts, which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new stock. Thus he may, by a grant or devise of it, or charge upon it, appropriate it to himself, and change the course of the descent. In like manner it may be taken in execution for his debt during his life, and this in the same manner intercepts the descents. But if no such acts be done, the rule above stated prevails, and the heir of the donor shall take the estate, though he be not heir of the reversioners, &c. Thus, in case of an estate in dower or by the curtesy, after the death of the last owner in fee, the heir takes only a reversion. But it is a misnomer to call it a case of *suspended descent*; for the reversion descends and vests absolutely in the heir; he may sell it, incumber it, devise it, and it is subject to execution as part of his property during his life.

33. A reversion expectant on *an estate tail* is said not to be assets during the continuance of the latter, being deemed of no value, by reason of the power of the tenant to bar the entailment by a common recovery. But such reversion is assets, when it falls into possession.¹

34. In regard to contracts and conveyances made by those holding expectant interests, the law, regarding them as from the nature of their estates peculiarly liable to imposition, has established peculiar rules for their protection. *An heir* has, in strictness, neither a reversion nor remainder, (except in case of a contingent remainder, limited expressly to the heirs of one living; and to this the rules in question are not applicable, because a contingent remainder cannot be conveyed). He has a mere *expectancy*, wholly subject to the disposition of his ancestor. But inasmuch as all expectant interests, with respect to the principle now to be considered, stand upon substantially the same foundation; it seems not inappropriate to present a general view of the subject under the present title.

35. The general principles of law upon this subject are thus stated by Parsons Ch. J., in the case of *Boynton v. Hubbard*.² When an heir gives a bond, on receiving a sum of money, to pay a larger sum, exceeding legal interest, upon the death of his ancestor, if the heir shall be then living; if there is only a reasonable indemnity for the hazard, it may be enforced at law. But, if his necessities are taken advantage of, he is relieved as against an unconscionable bargain, on

¹ 2 Cruise, 303.

² 7 Mass. 119-20.

payment of principal and interest. So when one, having a reversion or remainder, contracts to sell it, on becoming possession, for money paid at the time of the bargain, a similar rule is adopted. Here there may be a computation of the risk, as involved in the continuance of the preceding estate; and the bargain, like that before mentioned, may be relieved against if unconscionable. If the reversion or remainder be actually conveyed, Equity alone can give relief, unless there were absolute fraud. But a contract, made by an heir, to convey on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution or devise, is a fraud upon the ancestor, productive of public mischief, and moreover in the nature of a *wager*, without furnishing any means of computing the risks, &c. as to the amount of property and the value of the inheritance, and is therefore void both in law and Equity.

36. It has been since held, however, in the same State, that such a contract is valid, if made with the ancestor's consent, for a valuable consideration, and without imposition upon the heir.¹

37. Relief has been constantly granted in Equity, in what are called *catching bargains*, with heirs,² and, in modern times, reversioners and expectants, in the life of their parents or other ancestors, or during the continuance of prior, particular estates. Many and indeed most of the cases have been compounded of all or every species of fraud; there being sometimes proof of *actual* fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting; weakness on one side, usury on the other, or extortion or advantage taken of that weakness. Generally, there has been deceit upon third persons; the father or other ancestor has been kept in the dark, and thereby misled and seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand. The doctrine is founded, in part, upon the policy of maintaining parental and *quasi* parental authority, and preventing the waste of family estates; as well as to guard distress and improvidence against calculating rapacity. Equity treats parties in this situation almost like *infants*, incapable of contracting; and, although formerly undue advantage must be shown to have been taken, it now requires the purchaser to *make good the bargain*, that is, not merely to show the absence of fraud, but payment of a full consideration. The Court will relieve, upon the general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. Years do not seem to make much difference in the case of expectant heirs; since the aim of the rule is principally to prevent imposition upon ancestors. And the same rule applies, it seems, to reversioners and remaindermen, if necessitous, distressed and embarrassed.

¹ 8 Pick. 480.

² 1 Story on Eq. 327-33. *Chesterfield v. Janssen*, 2 Ves. 157. (See 5 Sim. 511).

38. The policy of this rule has been questioned, and it has been thought to have the effect of throwing necessitous owners of expectancies into the hands of those who are likely to take advantage of their situation ; for no one can securely deal with them. It has also been doubted whether the rule is strictly applicable, unless a reversioner also combines the character of heir. But the weight of authority seems to negative any such restriction or limitation.

39. The rule above referred to, being founded in part at least, in the case of heirs, upon the ground of imposition practised on the ancestor, is inapplicable, as has been seen (s. 36), where the transaction was known and not objected to by him ; and *a fortiori* if he expressly sanction or adopt it, or the heir is of mature age. It seems there is the same exception to the rule, where the party is a reversioner, &c., and the bargain is known and not objected to by the prior tenant.¹

40. Another reason of the rule creates another exception to it ; namely, where the party is not dealing under the pressure of necessity. But, it seems, the rule is applicable, if either of the reasons on which it is founded exist ; and it is not necessary that both should concur.²

41. If the heir is dealing substantially for his expectations, although for a present obligation also, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, Equity will interpose ; as where the heir received an annuity worth about one sixth of the value of the reversion ; though an interest in possession, amounting to £99 a year, was included in the sale.³

42. The rule in question, perhaps, is not applicable, where there is a fair though secret agreement among heirs themselves to share equally, and thus to cut off all attempts to overreach each other, and to prevent all exertions of undue influence.⁴

43. In relation to the contracts of heirs, &c. respecting their future estates, as they are not *void*, but only *voidable* ; in general, any confirmation of them, after the party comes in possession, and the former unfair inducement has ceased, will render them valid. But it will be otherwise, if the former pressure or necessity still continues, or if the party acts under the belief that the original contract is binding upon him. It has been held in some cases, that if the contract is *illegal* or *unjust*, it is absolutely void, and not susceptible of confirmation.⁵

44. If the heir or other expectant, after being restored to his legal capacity, becomes opposed to the other party, and does any act, by which the rights or property of the latter are injuriously affected ; upon

¹ King v. Hamlet, 2 My. & K. 473-4.

² Ib. 4 Sim. 182.

³ Earl, &c. v. Taylor, 4 Sim. 209-10. (See Younge, 543).

⁴ 1 Story, 334.

⁵ Ib. 338-9, and n.

the principle, which forbids a party to repudiate a dealing, and at the same time to avail himself fully of all the rights and powers resulting therefrom; the heir, &c. will not be allowed to rescind the bargain. So, if he dispose of the consideration received for his reversionary interest, in such way that it can never be restored to the other party in its original condition; he will not be allowed to rescind, unless he can show, that this disposition was made under a continuance of the original pressure.¹

45. In Maryland, the Chancellor may, after notice, order a sale of lands in the State belonging to any minor who resides out of the United States, or of any remainder or reversion dependent thereon, for payment of his debts. A subsequent act provides for the sale of any reversion belonging to a minor, dependent upon a life estate, and that, upon the assent of the tenant for life, the annual interest or a suitable part thereof shall be paid him for his life.²

46. In Maryland, it was formerly the practice to assess taxes upon land held by an estate for life, equally, half and half, upon the particular tenant and the reversioner in fee. But a statute provides that the whole shall be assessed upon the former as if he owned the fee.³

47. In New Jersey, Michigan, Mississippi and New York, it is provided, that a reversioner, &c. may be admitted to defend a suit brought against the tenant for life at any time before judgment; and that the former shall not be prejudiced by any default, surrender or giving up of the land by the latter.⁴

48. In New York, a process is provided, by which reversioners and remaindermen may annually call for the production or appearance of tenants for life, upon whose estates their expectancies depend, and whose residence is unknown or concealed.⁵

49. In Massachusetts, where a tenant for life recovers the land by action, and pays to the defendant the value of improvements made upon it by the latter, such tenant for life or his representatives, at the termination of his estate, may recover the value of the improvements, as they then exist, from the reversioner or remainderman, and shall have a lien therefor upon the land, as if it were mortgaged for payment of such amount. The reversioner, &c. may also have a bill in Equity to redeem, as in case of mortgage, if the amount is not agreed by the parties. He will not be limited to three years, but he shall recover no balance from the defendant, though the rents and profits have exceeded the sum due for the improvements. The reversioner, &c. shall be considered as disseised at the termination of the prior estate, and the statute of limitation shall run against him accordingly.⁶

¹ Ibid. *King v. Hamlet*, 2 My. & K. 456.

² Md. L. 129. 5 Ibid. ch. 154, s. 13.

³ Md. L. 1798, ch. 98.

⁴ 1 N. J. Rev. C. 346. Mich. L. 293. Missi. Rev. C. 449. 2 N. Y. Rev. St. 339.

⁵ 2 N. Y. Rev. St. 343.

⁶ Mass. Rev. St. 615.

CHAPTER LIII.

JOINT TENANCY.

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|---|---|
| 1. Number and connexion of the owners of real estate. | 16. Unity of time. |
| 3. Joint tenancy, how created. | 22. " " possession. |
| 5. " " in a remainder. | 23. Survivorship. |
| 8. " " for lives, and several inheritances. | 24. Exceptions to the rule of survivorship. |
| 12. Unities necessary to joint tenancy. | 34. Who may be joint tenants. |
| 13. Unity of interest. | 45. Not subject to charges made by one. |
| 14. " " title. | 46. Except by lease. |
| | 52. Severance of joint tenancy. |

1. WITH respect to the number and connexion of the owners of real estate, it may be held, according to the English law, in four ways, viz. in severalty, joint tenancy, coparcenary, and common. Upon the first of these kinds of tenancy, of course, it is unnecessary to make any remarks. In Ohio, it is said, that the three last named estates are reduced to one estate.¹

2. Chancellor Kent says, that two or more persons may have an interest in connexion in *the title* to the same land, as joint tenants or coparceners, or in *the possession* of the same as tenants in common.²

3. Where lands are granted or devised to two or more persons, to hold to them and their heirs, for their lives, or for another's life; they all take a joint estate, and are called joint tenants.³

4. Joint tenancy can be created only by acts of parties, and never by acts of law.⁴

5. Joint tenancy may exist in *a remainder*. Thus, if a conveyance be made to two persons, and the heirs of their two bodies, remainder to them two and their heirs; they are joint tenants of the remainder in fee.⁵

6. Conveyance to two persons, and the heirs of one of them. They are joint tenants for life, and one of them has the fee. If this one die, the other shall hold the whole by survivorship for life. So, two persons may be joint tenants for life, and one of them have an estate tail. It seems, in each of these cases, the inheritance vests by way of remainder.⁶

7. Lord Coke says, that when land is given to two persons, and the heirs of one of them, he in remainder cannot grant away his fee simple.

¹ Walk. 291.

² Lit. 277.

³ Co. Lit. 183 b.

⁴ 4 Kent, 357.

⁵ 2 Cruise, 431.

⁶ Lit. 285.

Mr. Hargrave's construction of this passage is, that although in some respects the life estate and the remainder are vested in one person, as distinct interests, yet they are so far consolidated that the latter cannot be transferred separately, and as a remainder.¹

8. Two men may have joint estates for their lives, and yet several inheritances, in the same land. Thus, if a conveyance is made to A and B, being both males or both females, and the heirs of their bodies, and both of them have issue, during their joint lives they hold as joint tenants; upon A's death, B will take the whole for his life; and upon B's death, the respective issue of A and B will hold as tenants in common. It is said, however, that in case of a devise in this form, it is not the intention of the testator that the surviving tenant should turn out the issue of the other.²

9. So, a devise to A and B and their issue, and in default of such issue to C, gives A and B a joint estate for life and several inheritances.³

10. A limitation to a man and woman and their issue, it seems, will not create several inheritances, because it will be presumed to contemplate their intermarriage together, and the birth of joint issue. But a limitation to two men and one woman, and the heirs of their three bodies begotten, will create several inheritances; because the chance of the woman's marrying both men, though possible, is a possibility upon a possibility. The same principle applies to a gift made to one man and two women; and also to parties whose relationship precludes the possibility of their legally marrying each other.

11. Lord Coke says, in all these cases there is no division between the estates for life and the several inheritances. The tenants for life cannot convey away the inheritance after their decease, because it is divided only in supposition and consideration of law; and to some purposes the inheritance is said to be *executed*.⁴

12. Joint tenancy requires the following points of *unity*, viz. of *interest, title, time, and possession*.

13. With respect to *unity of interest* it is said, that one joint tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one. This principle, however, seems to be only partially true, and the instances and illustrations, adduced in the books, show a discrepancy for which it is difficult to discover any satisfactory reason. Thus, a conveyance to two persons, to the one in fee and the other in tail, or to the one for life and the other for years, does not create a joint tenancy. So a reversion upon a freehold, or a right of action or of entry, cannot stand in jointure with a freehold and inheritance in possession. But, on the other hand, it has been seen (s. 6), that a limitation to A and B, and the heirs of A, makes

¹ Co. Lit. 184 b, and n. 2.

² Lit. 283. *Cook v. Cook*, 2 Vern. 545. *Wilkinson v. Spearman*, 2 P. Wms. 530. Printed cas. H. of L. 1705.

³ *Ib.*

⁴ *Ib.* Co. Lit. 184 a.

A and B joint tenants for life. So a right of action and a right of entry may stand in jointure.¹

14. *Unity of title* requires that the estate of joint tenants be created by the same limitation or lawful act of party, or by the same disseisin or unlawful act.

15. Although some of the persons to whom an estate is limited take by common law, and others by way of use, they may still be joint tenants. Thus, where a fine was levied to A and B, to the use of A and B, and also to C; held, a joint tenancy, though A and B were in by the fine, and C by the Statute of Uses.²

16. With respect to *unity of time*, the general principle is stated to be, that it is necessary to a joint tenancy that the estate become vested in all the tenants at the same instant. Thus, if a conveyance is made to A for life, remainder to the heirs of B and C; upon the death of B, a moiety of the remainder vests in his heirs, and upon the death of C, the other moiety in C's heirs; and therefore these respective heirs are not joint tenants.³

17. This principle, however, does not apply to the learning of uses and executory devises.

18. It has also been held inapplicable to husband and wife. Thus, if a man convey to the use of himself and of any future wife; upon his marriage, the husband and wife become joint tenants, although their estates vest at different times. This, however, is a case of *use*, and may be sustained upon that principle alone.

19. So, where limitations take effect at different times, still, *if the root is joint*, as in case of limitations to successive children of one parent; there may be a joint tenancy. And in one case it is stated generally, that a joint claim *by the same conveyance* makes joint tenants, and not *the time of vesting*. And in another, that if the parties claim by *one title*, though taking at different times, this is a joint tenancy.⁴

20. Devise to a woman and her children on her body begotten or to be begotten by A, in fee. Held, the woman and her children were joint tenants, though the estate vested in them at different times.⁵

21. Mr. Hargrave was of opinion, that these exceptions to the general principle are limited to conveyances by way of use and to devises. And some decided cases seem to favor this opinion. But Lord Thurlow appears to have rejected the distinction between limitations to uses and others.⁶*

¹ Co. Lit. 182 b.

² 2 Cruise, 433. Co. Lit. 188 a.

³ Watts v. Lee, Noy, 124.

⁴ Co. Lit. 188 a. 4 Kent, 358. Gilb. Uses, 71. 3 Bulstr. 101. 6 Cro. Jac. 259. 1 Ld. Ray. 310. 2 Prest. on Abstr. 67. Matthews v. Temple, Comb. 467.

⁵ Oates v. Jackson, 2 Stra. 1172.

⁶ Co. Lit. 188 a, n. 13. Samme's case, 13 Co. 54. Stratton v. Best, 2 Bro. 233.

* In a late case of *personal property*, the old doctrine upon this subject was adhered to. Bequest to A for life, and after her death to her children when they became of

22. With respect to *unity of possession*, joint tenants are said to be seised *per my et per tout*. Each of them has the entire possession of every part and of the whole. Each has an undivided moiety of the whole, not the whole of an undivided moiety. Hence the possession and seisin of one is that of the other also.

23. The principal incident to an estate in joint tenancy, is the right of *survivorship*; by which, upon the death of one joint tenant, whether the estate is a fee, or a term for years, or a trust, his interest passes not to his heirs or other representatives, but to the surviving co-tenant or co-tenants. And though one of two lessees for years dies before entry, the survivor shall take his interest.¹

24. In some cases, however, joint tenancy may exist, without the mutual right of survivorship.

25. Lease to A and B during the life of A. Upon the death of B, A takes the whole; but upon the death of A, B takes nothing.²

26. Although, as has been seen, trusts are subject to survivorship, yet the general principle is, that the right of survivorship is looked upon as odious in *Equity*, being often attended with hardship and injustice. Hence, upon the death of one joint owner, his estate has been held to pass to his heirs.³

27. Thus, if one of two mortgagees, who have jointly advanced the mortgage money, dies; his representatives shall have a share of the money when paid. This principle, however, seems to be limited to cases where they advance unequal portions of the whole sum. If each advances a moiety, which appears by the deed, this is regarded as a joint purchase of the chance of survivorship. When the proportions are unequal, the mortgagees are regarded in law either as *partners*, in which case, though the survivor take the whole legal estate, he becomes a trustee for the other; or as actual tenants in common, with no right of survivorship.⁴

28. Upon the same principle, where one of two joint purchasers of land lays out money in repairs and improvements, and dies; the expense is a lien upon the land in favor of his representatives.⁵

29. The doctrine above-stated has been broadly laid down by Sir Joseph Jekyll in this form; that the payment of money creates a trust for the parties who advance it, and an undertaking upon the hazard of profit or loss is in the nature of *merchandizing*, when the *jus accrescendi* is never allowed.

30. In this extent, the principle is by no means limited to convey-

age. A had two children, who lived to be of age. Held, they took as tenants in common, because the property vested in them at different times. *Woodgate v. Unwin*, 4 Sim. 129.

¹ Lit. 280-1. Co. Lit. 46 b. 2 Vern. 556. 2 P. Wms. 530. Bunb. 342.

² Co. Lit. 181 b.

³ Bunb. 342. Gould v. Kemp, 2 My. & K. 309.

⁴ Petty v. Styward, 1 Ab. Eq. 291. 2 Ves. 258.

⁵ Aveling v. Knipe, 19 Ves. 441.

ances in mortgage, or to liens arising from the laying out of money upon the land, or to unequal advances of money by the respective parties. Thus, where several persons agreed to drain certain overflowed lands, and a deed was made to them of the lands in consideration of a certain sum of money, and they proceeded to lay out money in prosecution of the undertaking; it was held that the parties were tenants in common.¹

31. Though the circumstance, that the consideration for a conveyance is advanced unequally by the several grantees, seems to have been regarded as important in determining the nature of their tenancy; yet the general rule is, that a deed given to several persons, and not designating their respective proportions, will pass to each an equal share of the land. The amount of consideration paid by each of them cannot be shown by parol evidence; and if one dissent to the conveyance, his share does not pass to the other grantees, but reverts in the grantor.²

32. The equitable principle, that where a purchase of land is made by two persons, with a view to expending large sums of money in the improvement of it, they shall be regarded as tenants in common, has been recognised in Pennsylvania. But the inequality of the sums paid by the respective parties seems to have been considered as an unimportant circumstance; and it is intimated that the principle is inapplicable, unless the case is clearly shown to be of a mercantile nature, and connected with a partnership in business.³

33. While the case of joint mortgagees has been held in England an exception to the rule of survivorship; in this country, where, as will be seen hereafter, joint tenancy is, for the most part, abolished, it is held, for peculiar reasons, still to subsist between parties of this description. (See ch. 54, s. 20).

34. Bodies politic or corporate cannot be joint tenants with each other nor with individuals; because they take in their political capacity, and are seised in several rights, by several titles and capacities. But the mere designation of a grantee by his corporate character will not prevent his holding as joint tenant. Thus, if a conveyance is made to A, bishop of B, and C, to have and to hold to them and *their heirs*, they are joint tenants. So the rule does not apply to the conveyance of a chattel real, because this cannot pass in succession. Hence in case of a lease for years to a bishop and a natural person, they are joint tenants.⁴

35. An alien and a citizen may be joint tenants; but the interest of the former is subject to escheat.⁵

36. Husband and wife, being considered in law as one person,

¹ Lake v. Craddock, 3 P. Wms. 158.

² Duncan v. Forrer, 6 Bin. 193.

⁴ Co. Lit. 190 a.

³ Treadwell v. Bulkley, 4 Day, 395.

⁵ Co. Lit. 180 b, n. 2.

cannot take by moieties, as joint tenants, each an undivided moiety of the whole; but upon a conveyance to them each has the *entirety*; they are seised *per tout*, and not *per my*, and the husband can neither forfeit nor alien the estate. It will be seen hereafter that this rule is changed in some of the States.¹

37. Upon this principle, where a conveyance is made to husband and wife and a third person, the two first take one moiety, and the last the other.

38. The doctrine above stated was held in a very early case, where a husband to whom with his wife an estate had been conveyed, was attainted and executed for high treason in the murder of King Edward II. The heir of the wife, after her death, claimed the land by petition to Edward III., against a stranger to whom the king had granted a patent therefor; and upon *scire facias* had judgment in his favor.²

39. The consequence of this principle is, that the husband has no power to convey or incur the land, so as to bind the wife after his death. Neither of them can sever the jointure, but the whole must go to the survivor.³

40. The same principle has been held, where the limitation was made to the husband and wife and the longer liver of them; and after the death of the longer liver, to their right heirs forever.⁴

41. But it does not apply to a conveyance made to a man and woman not married at the time, but who intermarry afterwards. The tenancy originally created is not defeated by their subsequent connexion.⁵

42. It has been held in Connecticut, that where husband and wife bring an action to recover a debt due her before marriage, and land is set off to them on execution in satisfaction of the judgment, they become joint tenants of such land, as they were joint tenants of the judgment.⁶

43. The widow of a joint tenant is not entitled to dower. The survivor comes in by a paramount title, which he may allege in pleading as derived directly from the grantor, without naming his companion.⁷

44. It was formerly held, that where lands were given to two women and the heirs of their two bodies, the husband of one of them deceased should be tenant by the curtesy, the inheritance being executed. Lord Coke says, that Littleton has cleared up this doubt, by

¹ Lit. 291. Co. Lit. 187 a. Ch. 54, s. 15.

² Co. Lit. 187 a.

³ Back v. Andrews, 2 Vern. 120. Green v. King, 2 Black. R. 1211. Doe v. Parrott, 5 T. R. 652.

⁴ Green v. King, 2 Black. R. 1211.

⁵ Co. Lit. 187 b.

⁷ Lit. 45. Co. Lit. 37 b.

⁶ Hammick v. Bronson, 5 Day, 290.

showing that the inheritance is not executed, and therefore that there is no curtesy.¹

45. One joint tenant, as has been already intimated, cannot charge or incumber the estate to bind the other who survives him; as, for instance, by a rent-charge or recognisance. So, if one joint tenant suffers a judgment to be entered up against him, and dies before execution of it, no execution can be had; but an execution sued in his life binds the survivor. And all charges bind the party himself who makes them, during his life; or, if he survive the other, absolutely.²

46. An exception to this rule, however, is a *lease*. A joint tenant may bind his fellow by a lease for years, even though limited to commence only after his own death. Even in such case, it is said to be an immediate disposition of the land.³ But where one of two joint tenants for life leased for years his own moiety, to commence from the death of the other, and the other moiety by the same instrument to commence from his own death, and died; held, the whole was void, because he had no power to lease his companion's share, and the lease of his own, over which he had power, was not to commence till the other's death.⁴

47. Although a joint tenant cannot charge or incumber the estate, so as to affect the right of survivorship, yet he may convey his whole interest; and in this way, as will be presently seen, *sever* the tenancy.

48. It is said, that in consequence of the intimate union of interest and possession between joint tenants, they are obliged to join in many acts, such as *fealty*, in England. But, on the other hand, there are many cases, where the act of one is regarded in law as that of the whole. Thus, the entry of one, and the seisin thereby acquired, inure to the benefit of all. So, in case of a joint lease by them, a surrender to one is a surrender to both. So, if one commit waste, the others forfeit the land, though he alone is liable to treble damages.⁵

49. The possession of one joint tenant being in law that of the other also, one cannot disseise another but by actual ouster. Thus, in England, a fine levied by one of the whole land is no disseisin.⁶

50. Joint tenants, having one entire and connected right, must in general join and be joined, in all actions respecting the estate.⁷*

51. Some other incidents of joint tenancy, common to this estate and to tenancy in common, will be considered hereafter.

¹ Co. Lit. 30 a, 183 a. 2 Cruise, 335.

² Co. Lit. 184 a, 185 a. Lit. 296. 6 Rep. 78.

³ Co. Lit. 185 a. 2 Vern. 323. Gould v. Kemp, 2 My. & K. 310.

⁴ Whitlock v. Huntwell, 2 Rolle's Abr. 89. (Infra s. 59).

⁵ Co. Lit. 67 b. 1b. 49 b. 6 Mod. 44. 2 Cruise, 337. 2 Inst. 302.

⁶ 1 Salk. 392; 2, 423.

⁷ 4 Kent, 359.

* In Mississippi it is expressly provided, that in real and mixed actions, a defendant may plead in abatement, that another person holds the land jointly with himself. Missi. Rev. C. 116. So in Virginia. 1 Vir. Rev. C. 237. In Rhode Island, a suit for the land may be brought by all the tenants, or any two of them, or one alone. R. I. L. 208. In Connecticut, it has always been the practice for one joint tenant to sue alone. 1 Swift, 102.

52. It is said, that a joint tenancy may be severed, by the destruction of any of its constituent unities, except that of time, which, as it relates solely to the commencement of the estate, cannot be affected by any subsequent transaction.¹

53. A joint tenancy is destroyed by destruction of *the unity of interest*, which may take place either by act of parties or act of law.²

54. It has been seen, that there may be joint tenants for life, remainder to the heirs of one of them; or, in other words, that one joint tenant may have a life estate and the other a fee. The whole interest being created at one time, the fee simple cannot merge the jointure which had no previous existence. But it is otherwise, where one of several joint tenants for life takes a conveyance of the fee, after the creation of the original joint estate; the jointure is severed by a merger of the life estate in the fee simple. It is said, that if such tenant for life might purchase the reversion in fee, and still retain his life estate; he would have power to convey the reversion by itself, which, it has been seen, the law does not allow, where the two estates are joined by the *original limitation*.³*

55. So, where there are joint tenants for life, and a new conveyance in tail is made to them; the joint tenancy is severed.⁴

56. So a descent of the fee to one of two joint tenants for life severs the joint tenancy. Thus, where one devised to his two youngest sons for life, and afterwards the reversion came to one of them by descent from the eldest son; held a severance of the jointure.⁵ It would seem, from analogy to the distinction stated in s. 54, that if the devise were made for life to the *eldest* son and another, as the reversion and life estate must come to the former by the same event, the death of the testator, the joint tenancy for life would still exist.

57. Another mode of severance is by destroying *the unity of title*. Thus, if one joint tenant conveys his interest to a third person, inasmuch as this person claims title by a conveyance from the joint tenant, and the remaining joint tenant claims title by the original conveyance, the jointure is severed.⁶

58. A conveyance by one joint tenant of his interest in the land destroys the unity of *possession*, as well as of *title*. The remaining joint tenant and the grantee have several freeholds.

59. A lease for life by one joint tenant operates as a severance. And the severance applies to the reversion, as well as the particular

¹ 2 Cruise, 338.

² Co. Lit. 182 b. Wisecot's Case, 2 Rep. 80.

³ Co. Lit. 182 b.

⁴ Lit. 292.

⁵ Ib.

⁶ 2 And. 202.

* This distinction is analogous to that above-mentioned (p. 397), in regard to the destruction of contingent remainders.

estate. A lease for years operates as a severance *pro tanto*. So an underlease by one of two joint tenants for years.¹

60. It has been held, in Equity, that a joint tenancy in a trust term may be severed by a mortgage made by one of the tenants. This is contrary to the general principle, that no *charge* upon the estate shall interfere with the right of survivorship.²

61. A conveyance, which is in law invalid, will not operate to sever a joint tenancy, even in Equity; as for instance, a conveyance made to the wife of the tenant, though immediately before his death, and for the purpose of providing for her.³

62. Whether mere articles of agreement may in Equity operate as a severance of joint tenancy, seems to be a doubtful point, though the prevailing opinion is that they may.⁴ But when made by an infant, they do not have this effect. Being in their nature avoidable by the party, it is in the discretion of the Court of Equity either to give or refuse its assistance. It may model such a contract at pleasure. And, in the view of Equity, a surviving joint tenant is not considered as a mere volunteer, but as claiming by title paramount, like the issue under an entailment. If the other tenant had died first, the infant might have avoided his act, and claimed by survivorship. Hence, to set up this act as a severance, would be manifestly unequal and unjust. Upon these grounds, articles of agreement, by which a female infant, upon her marriage, covenanted with her proposed husband and trustees to settle her lands, held in joint tenancy, upon the husband, were held not to be valid in Equity against the claim of the surviving joint tenant.⁵

63. A joint tenancy cannot be severed by *devise*.† A devise takes effect only by the death of the testator, which also vests the title by survivorship in the remaining tenant; and the two claims being concurrent in time, the law gives priority to the latter.⁶

64. If a joint tenant makes a will, and then becomes solely seised by survivorship, the will does not operate upon the title so acquired without republication.⁷

65. A severance may be effected by the alienation of one joint tenant to another. It is said that this should be done in the form of a *release*, because both are actually seised of the estate before.⁸

66. If there are three joint tenants, and one of them releases to one

¹ Lit. 302. Co. Lit. 192 a. (Supra s. 46).

² York v. Stone, 1 Abr. Eq. 293. 1 Salk. 158.

³ Moyse v. Giles, Prec. in Cha. 124.

⁴ 2 Vern. 63. 2 Ves. 634. 2 Ves. jun. 257.

⁵ May v. Hook, Co. Lit. 246 a, n. 1. 1 Bro. 112.

⁶ Lit. 287. Co. Lit. 185 b. 1 Bl. Rep. 476.

⁷ 4 Kent, 360. ⁸ 2 Cruise, 342.

* A and B being interested in a fund as joint tenants, A, by letter to B, engages to secure to his family in any way B may desire by his will, a moiety of the fund. Held, a severance of the joint tenancy. Gould v. Kemp, 2 Mylne & K. 304.

† An ancient statute in South Carolina, not now in force, provided otherwise.

of his companions, the latter holds one third of the land in common, and he and the other tenant hold two thirds as joint tenants. But if one release to all the others, they hold in law under the original conveyance, and not under the release; and therefore remain joint tenants as before.¹

67. By accepting a release from his companion, a joint tenant recognises the validity of any previous charge upon the estate made by the releasor, which he might have avoided under the title by survivorship. Thus, if one joint tenant grant a rent-charge from the land, and afterwards release to the other and die; although, as between the two joint tenants themselves, the releasee holds not by the release but by the original joint conveyance, yet, as to the grantee of the rent, he claims under the release, and therefore his title is subordinate to the rent.²

68. Joint tenants may make a severance by voluntary partition. But such partition must be by deed.³

69. At common law, one joint tenant could not compel another to make partition. But by Statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint tenants are enabled to make partition of their estates by means of compulsory legal process, called a writ of partition. The methods of obtaining partition in the United States, which are substantially the same in relation to joint tenants and tenants in common, will be particularly considered hereafter.

CHAPTER LIV.

TENANCY IN COMMON.

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| <ul style="list-style-type: none"> 1. Three forms of joint ownership in England. 2. Coparcenary; obsolete in the U. S. 5. Tenancy in common, what. 6. Joint tenancy favored in England, but discountenanced in the U. S.; statutory provisions changing it into tenancy in common. 15. Exceptions—husband and wife. 20. Joint mortgagees. | <ul style="list-style-type: none"> 25. Trustees and executors. 26. Statutes apply to vested estates. 30. Legislative grants. 34. Estate in common subject to the same rules with a several estate. 37. But a tenant cannot convey by metes and bounds. General rights and remedies of tenants in common, &c. |
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1. By the English law, as has been stated (ch. 53), there are three modes in which several persons may own real estate together;

¹ Lit. 304. ² Cruise, 342.

³ Co. Lit. 185 a. Abergavenny's case, 6 Rep. 78 b.

² 2 Cruise, 343.

viz. *joint tenancy*, *coparcenary*, and *tenancy in common*. The first of these has been already considered.

2. The second mode of joint ownership—*coparcenary*—always arises from *descent*. At common law, it took place, when a man died, seised of an inheritance, and left no male issue, but two or more daughters, or other female representatives. Coparceners have distinct estates, with a right to the possession in common, and each may alienate her share. So one may release to another, with the same effect as in case of joint tenancy.¹

3. Coparceners, like joint tenants, have a unity of title, interest and possession. They are also said to be seised *per my et per tout*. But still there is no survivorship between them, and either may devise her estate.²

4. The common law learning of partition, in respect to parceners, is called, by Lord Coke, *a cunning learning*, and is replete with subtle distinctions and antiquated erudition. But in the United States, as lands descend to all the children equally, whether male or female, the common law definition of coparcenary has become inapplicable; and the English doctrines in relation to it are also of little importance, because the ownership of joint heirs is in some of the States expressly declared to be, and in all of them is in effect, a tenancy in common.* The technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States.³ The only peculiar incident of the former is, that partition may be made among parceners by the Probate Courts, to which the settlement of the estates of deceased persons appertains.⁴

5. *Tenancy in common*, by the English law, is where two or more persons hold lands and tenements by *several titles*, not by a *joint title*, and occupy them in common. The only unity required between such tenants is that of possession. It has already been seen, (ch. 53), that a tenancy, which would otherwise be a joint tenancy, for the want of unity in interest, title or time, is held a tenancy in common.

6. The common law favored title by joint tenancy, by reason of the right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connexion. But it has been said, that the reason of that policy had ceased with the abolition of tenures, and that even the Courts of law were no longer inclined to favor joint tenancy; and it has been seen, (p. 432), that survivorship is discountenanced by a Court of Equity. In the United States, where feudal tenures are unknown, upon the ground that tenancies in common are more beneficial to the Commonwealth and consonant to the genius of republics,⁵ the old English doctrine upon this subject has been, not partially qualified

¹ 4 Kent, 364.

² *Ib.*

³ *Ib.*

⁴ 1 Swift, 104.

⁵ 5 Mass. 522.

* It is recognised by name in some of the States. Prince, 541. Ky. Rev. L. 560.

or subjected to occasional exceptions, but actually reversed in nearly all the States. In England, where several persons own land together, they are joint tenants, unless there is some special reason for a different ownership; but in the United States, in the absence of such reason, they are tenants in common. Chancellor Kent remarks,¹ that in this country the title by joint tenancy is very much reduced in extent, and the incident of survivorship still more extensively destroyed.* Inasmuch as survivorship is the only *practical* incident which distinguishes joint tenancy from tenancy in common, it is a question of no great importance, whether one or the other of these forms is adopted in changing the old law.

7. In Indiana,² joint tenancies are changed into tenancies in common. In South Carolina,³ the death of one joint tenant operates as a severance, and his estate passes to his heirs, as in case of a tenancy in common.

8. In the States of Maryland and New Jersey, an estate in joint tenancy can be created only by an express declaration that the land is to be owned in this way.

9. In New York, Delaware, Michigan, Illinois and Missouri, an exception is made from the same provision in regard to executors and trustees. In Massachusetts and Pennsylvania, trustees alone. In some of these States, the phraseology is, that a joint tenancy shall not arise, unless it is declared that the parties are to hold as joint tenants, "and not as tenants in common;" but probably no particular significancy is to be attached to this last expression.

10. In Tennessee, Mississippi, Illinois and Alabama, survivorship between joint tenants is expressly abolished by statute. In Connecticut, the doctrine was exploded in an early decision, and the law has never been since contradicted.⁴

11. In Vermont, Massachusetts,† Maine, New Hampshire and Rhode Island,‡ there must be express words, or an intention to that effect, to create a joint tenancy; and, in Vermont, the statute is declared applicable to estates previously created, as well as those which might arise subsequently.

12. In Massachusetts, another exception from the general provision is made in relation to *mortgages*, and conveyances to *husband and wife*. While in Rhode Island, on the contrary, conveyances to husband and wife are expressly declared not to constitute an exception.⁵

¹ 4 Kent, 361.

² Ind. R. L. 290.

³ 1 Brev. Dig. 435.

⁴ *Phelps v. Jepson*, 1 Root, 48, A. D. 1769. 1 Swift, 104.

⁵ 1 N. Y. Rev. St. 727. Md. L. 1822, 98. 1 N. J. Rev. C. 556. Del. St. 1829, 167. Mich. L. 261. Mass. Rev. St. 406. Illin. Rev. L. 130, 474. Miss. St. 119. Aik. Dig. 129. 1 Smith's St. 136-7. Verm. L. 177. R. I. L. 208-9. Purd. 417. 4 Kent, 361.

* In the Plymouth Colony, in 1643, it was enacted by the General Court, that survivorship should not apply to joint tenants. 4 Kent, 362 n.

† It shall "manifestly appear from the tenor of the instrument." Substantially the same language in Maine and New Hampshire.

‡ Words "clearly and manifestly showing otherwise."

13. In North Carolina,¹ there is no survivorship between joint tenants, except in the case of partners in business, and here only for the purpose of settling the joint concern. After such settlement, the survivor pays over the balance due to the representatives of the deceased partner.

14. In Virginia and Kentucky,² it is provided, that, of whatever kind the estate may be, it shall not pass to survivors, but shall descend, may be devised, and shall be subject to debts, charges, curtesy and dower, and be considered to every other intent and purpose in the same manner as if it had been a tenancy in common.

15. From this recapitulation of the statutory provisions in the several States, it appears that in some of them joint tenancy has been unqualifiedly abolished, while in others it is still retained in certain enumerated cases, for which it is peculiarly adapted; as in case of husband and wife, of executors and trustees, and of mortgagees. Massachusetts is the only State, in which conveyances to husband and wife are expressly excepted from the general provision of the statute.³ Rhode Island is the only one in which they are expressly included. But the prevailing rule of American law is, that the case of husband and wife is, *by implication*, not included in the general provisions upon this subject. The reasons for making this exception, equally applicable, it seems, in all the States, are thus stated by the Court in Virginia.⁴

16. Though a jointure might be destroyed by various acts, yet, at the common law, there was no mode, by which a partition might be compelled. To remedy this inconvenience, the Statutes of 31 and 32 Henry VIII. were passed. These speak of *all* joint tenants; but they have never been supposed to reach the case of husband and wife. All the books agree, not only that husband and wife cannot enforce partition, but that they cannot make it even by mutual consent. It is a *sole*, and not a *joint* tenancy. They have no moieties. Each holds the entirety. Notwithstanding any act of the husband, the wife, upon his death, takes the whole; not by *survivorship*, which implies an accession of something not owned before, but by virtue of the original limitation; and, as if the land had been given to them during the lives of both, and after the death of either, to the survivor alone. The expressions, *jointure*, *joint tenancy*, &c. are indeed often applied to the ownership of husband and wife; but only because these words approach nearer to a description of the estate than any others which could be used without circumlocution. This doctrine is said to have been settled for ages.⁵ The law stood thus when the Virginia act was passed, being substantially a copy of the English statutes; and

¹ 1 N. C. Rev. St. 253.

² 1 Vir. Rev. C. 31. 2 Ky. Rev. L. 876-7.

³ Thornton v. Thornton, 3 Rand, 183.

⁴ 5 T. R. 652.

⁵ In Ohio, a *decision* has been made to the same effect. 2 Ohio, 306.

this act must be supposed to have recognised the established principle in relation to husband and wife. Hence, when it provides, that upon the death of *joint tenants*, their share shall not *accrue* to the survivors; the case of husband and wife is not included in this clause, both because they are not joint tenants, and because between them there is nothing which can *accrue* from one to the other. Nor does the clause, "whether they be such as might have been compelled to make partition or not," vary this construction; because this clause is satisfied by the case of joint tenancy in personal property, or between a man and woman who afterwards intermarry, of which there could be no partition by law; and this application is favored by the mention of executors, &c. So the clause "of whatever kind the estate holden be," means merely to describe the *quantity* of the estate, as in fee, for life, &c. not the *quality*, which had been already sufficiently expressed by the word *joint tenants*. The words "if partition be not made" in the parties' lifetime, &c., imply that the case is one, where partition *might be made*, which is not the case as between husband and wife; not on account of this particular relation, but because each owns the whole estate. The statute intended to prevent the right of the deceased, which might have been disposed of in his life, from accruing to the survivor, and to devolve it upon the representative of the former; not to give a new right to his representatives, which he never had. But a purchaser from the husband would not hold as against the wife. A purchaser from a mere joint tenant would hold against the survivor; and therefore there was no necessity to provide for his protection. But if the act applies to husband and wife, the heirs, &c. of the former are provided for, while a purchaser from him is not. This construction would vest in husband and wife new rights, and take away a vested right from the other; and such construction ought not to be given, when another may be, which will only tend to preserve existing rights by repealing a rule of law, which, if unrepealed, might give such rights, in one event, to another.

17. The same principle has been recognised in Kentucky, Massachusetts and New York, upon substantially the same grounds.¹

18. It has been said, that husband and wife, holding lands by a conveyance to them, must both join in a conveyance; that they are both necessary to make one grantor; and the deed of either without the other is merely void.² It is to be observed, however, in qualification of this remark, that the husband, of course, has the same right in the wife's interest, *as husband*, which he has in any other estate belonging to her; and may therefore convey or mortgage it for his own life (there being children).³

¹ *Ross v. Garrison*, 1 Dana, 35. *Rogers v. Grider*, Ib. 243. *Shaw v. Hearsey*, 5 Mass. 521. 16 John. 115-6.

² *Doe v. Howland*, 8 Cow. 283.

³ *Barber v. Harris*, 15 Wend. 615.

19. Conveyance to a husband for the joint benefit of himself and his wife, but with no words limiting a trust for her separate use, though expressly excluding him from power to sell. Held, the land might be taken by creditors of the husband for his life.¹

20. It has been seen, that the Revised Statutes in Massachusetts except from the general provision in relation to joint tenancy, the case of a mortgage made to two or more persons. The former statute upon this subject made no such exception; but yet it was held to exist by implication. Parsons Ch. J. remarks, "as upon the death of either mortgagee, the remedy to recover the debt would survive, we are of opinion that it was *the intent of the parties*, that the mortgage should comport with that remedy, and for this purpose that the mortgaged estate should survive. Upon any other construction, but one moiety of the mortgaged tenements would remain a collateral security for the joint debt, which would be clearly repugnant to the intention of the parties."² In another case, Jackson J. assigns as an additional reason, that either of the mortgagees, by releasing the debt, would release the mortgage, and destroy their joint title and estate in the land.³

21. But after foreclosure, that which was originally a joint tenancy becomes a tenancy in common. The land is then no longer a pledge, but the title is vested absolutely in the mortgagee. The foreclosure operates as a new purchase. The mortgage is no longer an incident to the debt; nor is it connected with it, any more than if the partners had received payment of the debt and laid out the money in the purchase of the land. The entry for condition broken gives them a new and different estate.⁴

22. It has been doubted whether the same principle could be applied, where one of two joint mortgagees dies, and the survivor forecloses; for that would be to turn the estate from a trust into a use by the mere act of foreclosure.⁵

23. In the Circuit Court of the United States, it has been denied that a mortgage given to several persons constitutes them joint tenants. This decision was made under a statute of Rhode Island, which was similar in its terms to that of Massachusetts. Judge Story remarks,⁶ "the doctrine (held by Chief Justice Parsons) that a conveyance in mortgage to two persons, as tenants in common, becomes by the death of either no security, except for a moiety, cannot, in my judgment, be maintained in point of law. No authority is cited for it, and it seems to me irreconcilable with established principles. It cannot be deduced from the fact, that the debt vests by survivorship in one party, while the estate would pass to another. For, at the common law, upon the death of the mortgagee, the estate in the land vests in the heir, while the debt vests in the admin-

¹ Stoebler v. Knerr, 5 Watts, 181.

² Appleton v. Boyd, 7 Mass. 131.

³ Goodwin v. Richardson, 11 Mass. 469.

⁴ Randall v. Phillips, 3 Mas. 384.

⁵ 11 Mass. 472.

⁶ 3 Mas. 386.

istrator. Upon the like argument, it ought to follow in such case, that by the death of the mortgagee the whole security in the land should be gone; and yet it is well established, that the heir takes the land by descent, subject to redemption, and that the debt belongs to the administrator. So if a mortgage were made to two persons expressly as tenants in common, as security for a joint debt, by the common law they would hold in common; and, upon the death of either, his share would descend to his heir as tenant in common, and the survivor would hold the other moiety as tenant in common, at the same time that the debt would vest solely in him by survivorship for the purposes of the remedy. So if a sole mortgagee dies, the land descends to his heirs as parceners, while the debt belongs to the administrator. Hence it follows that the estate is still a security for the debt, into whose ever hands it passes. Judge Story proceeds to remark upon the fact, so strikingly opposed to the doctrine which he controverts, and which we have already noticed (p. 432), that even in England the implication in case of a mortgage to several persons is in favor of a tenancy in common instead of a joint tenancy; thereby constituting an exception to the general rule, directly the reverse of that established by the Court in Massachusetts.

24. In the case of *Randall v. Phillips*,¹ already referred to, Judge Story remarks, that in the eye of a Court of Equity, it would make no difference, whether the legal estate survived to the surviving mortgagee or not, because he would hold in trust for the representative of the deceased. There seems no reason to doubt that this would be the case at law as well as in Equity. There is no pretence that the survivor could retain *the whole debt*. And the very reason for holding to a survivorship in such case is, that the mortgage *follows the debt*.

25. With regard to trustees and executors, although for peculiar reasons they are excepted, in many of the States, from the general statutory provisions; yet, in the absence of any express exception, none will be implied. Thus it has been held in Kentucky, that survivorship is abolished as well in regard to trust estates as others.²

26. The American statutes, changing joint tenancy into tenancy in common, are almost universally made applicable by their terms to estates previously created, as well as those to be created subsequently. The objection has been raised, that in this particular such statutes are unconstitutional, as affecting rights and interests already vested; but it has always been overruled. It is said, the principle is correct, that the legislature cannot impair the title to estates, without the consent of the proprietors, unless for public objects, when an adequate consideration shall be provided. But there can be no objection to the operation of any legislative act retrospectively, which shall enlarge, or otherwise make more valuable, the title to any estate; for the consent

¹ 3 Mas. 387.

² *Saunders v. Morrison*, 7 Mon. 54.

of the holder may always be presumed to such acts. The new tenure is more beneficial than the old one to all the tenants; inasmuch as a certain inheritance in a moiety is more valuable than an uncertain right of succession to the whole. More especially is this principle to be applied, where both tenants have, by their acts, manifested an implied assent to the operation of the statute; as where each has brought a separate writ of entry for his undivided moiety against a stranger.¹

27. The same principle has been recognised in Pennsylvania. The Court remark as follows. The doctrine of survivorship was so little known to people in general, and so abhorrent to their feelings when known, that it was thought best to get rid of it at once. The Courts had been long struggling against it, but were unable, without a dangerous prostration of established principles, to go as far as they wished. The aid of the legislature was therefore necessary. The operation of the act is no invasion of vested rights. Who should be the survivor, was in contingency; and in the mean time either joint tenant might have severed the estate by legal means without the other's consent. The act of assembly did for them at once, and without expense, (that) which ninety-nine in a hundred wished to be done. But if there were any joint tenants who desired the chance of survivorship, they might have it by an agreement for that purpose. By putting a limitation on the plain words of the law, we should do an irreparable injury to many, who, reading the words as they are written, have supposed a partition unnecessary, and therefore have died without effecting it. The act deprived no man of his property; but only placed the parties on an equal and sure footing, leaving nothing to chance.²

28. Upon the same principle, where the demandants in a real action were joint tenants when it was commenced, and afterwards, by operation of law, became tenants in common; held, this change of title was no defence to the action.³

29. In the Statutes of some States upon this subject, a proviso is inserted, that they shall not affect estates already vested by survivorship. This would seem to be a superfluous caution; for the constitutional objection already referred to would undoubtedly prevent any such application of the statutory provisions.⁴

30. Independently of statutory provisions, it has been held in Massachusetts,⁵ that a grant of land *by the legislature* to several persons created a tenancy in common and not a joint tenancy, though the words used, if a private person were the grantor, would create the

¹ Miller v. Miller, 16 Mass. 61. Holbrook v. Finney, 4, 568. Annable v. Patch, 3 Pick. 363.

² Bombaugh v. Bombaugh, 11 Ser. & R. 192.

³ Hills v. Doe, 6 N. H. 328.

⁴ 11 Ser. & R. 193. 3 Pick. 363.

⁵ Higbee v. Rice, 5 Mass. 350.

latter estate. It is said, a grant by the legislature is a *statute conveyance*, and the intent of the legislature in passing the resolution must govern. Most of the public lands, which were alienated by the late province, and also by the Commonwealth, were passed by virtue of acts or resolutions of the legislature. Generally, the lands were granted in large parcels, to a great number of grantees, on condition of settlement, and for the purpose of forming towns. These grants have invariably, from the earliest settlement of the country, been held to create tenancies in common. From long use the practice has acquired the force of law, and a decision repugnant to it would produce infinite confusion, and affect very many titles to land in the State. More especially is this construction to be given, where the legislative grant is made to certain persons upon their petition, as the heirs of one who had before his death taken possession of the land. *As heirs*, they would not have taken in joint tenancy, and it cannot be presumed that the legislature intended they should so take *as grantees*.

31. So it has been held in New York, that where several patentees pay equal shares of the purchase money, and execute deeds among themselves, which recite that they purchase as tenants in common; such tenancy is created, although the patent is made to them jointly. This case, however, was decided rather on the ground of a trust, than upon that of a grant from the State.¹

32. The same doctrine has been recognised in Vermont. In the year 1781, the State granted a charter of a township to several persons, reserving one seventieth part for the use of a seminary or college. The proprietors did not divide or assert their title to the lands, and the whole were occupied and settled by other persons. A college being afterwards instituted, the trustees were empowered to take possession of the lands reserved, and they brought an action for them against one who had for thirty-eight years adversely occupied. The question arose, whether proprietors of lands, constituting towns, were to be regarded as tenants in common. In answer to the objections, that such proprietors may do many things *by vote*—as making a division of their lands into severalty, voting to settlers the lots on which they live, in lieu of their drafts; and authorizing a division *by pitches*; and may gain a title by the Statute of Limitations, and that their possessions are considered as several; the Court remark, that such proprietors are strictly tenants in common, and where they differ from ordinary tenants in common, the difference has been created either by statute or by a course of decisions in our courts of law. In the grants or charters, certain civil and political corporate privileges are given to those who inhabit the township, but not to the proprietors, who may be wholly distinct from the former. Grants in this country have always been construed to create tenancies in common, which in Eng-

¹ Cuyler v. Bradt, 2 Caines C. E. 326.

land would make joint tenancies. Unless the proprietors take an estate in common, it is difficult to define the nature of their interest.¹

33. But it has been held in Kentucky, that where a grant by the Commonwealth was made to two persons, and one of them died before a patent was issued, (previously to the statute abolishing survivorship), the survivor took the whole estate both in law and equity.²

34. The estate of a tenant in common is subject to the same dispositions, incidents and charges as an estate owned in severalty. Thus it has already been seen (p. 101), that the widow of a tenant in common has *dower*, subject, however, to the qualification, that if partition has been made after marriage, her claim shall be restricted to that portion of the land which is allotted to the husband.³

35. So an estate in common is subject to *curtesy*; and the possession of one tenant in common is regarded as so far that of the other, that the husband of the latter shall be tenant by the curtesy.⁴

36. An estate in common passes to *heirs*; and it has been seen, that this is one principal point of distinction between this estate and a joint tenancy.

37. It is to be observed, however, that the transmission of an estate in common to any party claiming under one of the tenants, passes nothing more than *the undivided interest* of such tenant, and has no effect to make a *severance* of the estate. Thus, the widow can claim for her dower only an undivided third of her husband's interest. Upon the same principle, a tenant in common may convey his estate to a third person, and the latter will hold in connexion with the remaining tenant, merely taking the place in all respects of the grantor. But a tenant in common cannot convey any distinct portion of the land by metes and bounds.*

38. Thus, where one of two joint tenants, after a parol partition which was held void, conveyed a part of the land by metes and bounds to a stranger; held, the entry of the latter gave him no seisin, but he was a mere several occupant; that he could not be considered as a disseisor of the grantor, as he entered by his consent; nor of the other joint tenant, because one joint tenant cannot be disseised by a stranger of any particular part, unless all are disseised.⁶

39. In a subsequent case, Jackson J. goes into a more minute examination of the law upon this subject. It is a general principle, that

¹ University, &c. v. Reynolds, 3 Verm. 543.

² Overton v. Lacy, 6 Mon. 15.

³ Sutton v. Rolfe, 3 Lev. 84. Co. Lit. 34 b, 37 b.

⁴ Sterling v. Penlington, 14 Vin. Abr. 511.

⁵ Porter v. Hill, 9 Mass. 34.

* While, with regard to parties claiming an interest in the estate *after the death* of the tenant, joint tenancy and tenancy in common are subject to totally different rules; the principles which regulate the transfer of them during his life, either by his own act or act of law, are substantially the same, and therefore the following remarks may be received as alike applicable to both estates.

one joint tenant cannot prejudice his companion in estate, or as to any matter of inheritance or freehold ; although as to the profits of the freehold, as the receipt of rent, &c., the acts of one may prejudice the other. But a conveyance by metes and bounds by one tenant, would, in many cases, tend to the prejudice and even to the destruction of the interest of the other. The owner of a moiety of a farm thus circumstanced, instead of one piece of land conveniently situated for cultivation, would, on a partition, be compelled to take perhaps ten or twenty different parcels interspersed over the whole tract, and separated by the parts allotted to the several grantees. Suppose that two men hold jointly or in common, land in a town sufficient only for two house lots, and that one of them could convey to ten persons his share in as many different portions of the land ; the other original co-tenant would, on a partition, be compelled to take ten different lots or parcels not adjoining to each other, and each too small for any useful purpose, instead of one house lot, to which he was originally entitled as against the grantor. The restraint upon such conveyance by one co-tenant, and not the privilege of making it, is to be considered as a necessary incident to the estate. Each tenant was originally entitled to one moiety, for quantity and quality, to be assigned to him in the modes pointed out by law ; and this right, on the part of one, cannot be impaired by a separate act of the other. If one co-tenant has the right to convey a part of the land, the others of course have the same. Suppose then that three or more persons hold in common a township of wild land, and that each, without regard to the others, should divide the whole into such lots as he thought proper, and sell his share in each lot to different purchasers. As the lines of the lots would perhaps never coincide, a partition among the several grantees would be very difficult and inconvenient ; and in case of a large number of owners, perhaps, impossible. While the right in question may be thus injurious, the restraint upon it can rarely if ever be so. Thus, if one of two co-tenants of forty acres wishes to sell ten, he may convey one undivided fourth of the whole, and the grantee may obtain partition by legal process. And this he must have done, if the conveyance had been of a moiety of twenty acres taken out of the forty. There is, therefore, no additional trouble or expense, and the only difference is, that the grantor is prevented from selecting any particular part of the land, from which the grantee shall take his share ; which is a right he could never claim himself, while he continued the owner of the whole moiety.¹

40. So, in a case decided in Connecticut,² Hosmer Ch. J. remarks, in regard to the objection that upon partition, the whole of that portion of the land which is conveyed might be assigned to the co-tenant ; that it is no answer to this objection, that the purchaser on

¹ *Bartlett v. Harlow*, 12 Mass. 349.

² *Mitchell v. Hazen*, 4 Conn. 510.

partition might have an equivalent share in other portions of the land assigned to him ; for in these he has no interest, and a partition, being a mere distribution and not a conveyance, is founded on an antecedent estate, and cannot communicate any new right.

41. Upon the same principle, the levy of an execution against one tenant in common, &c. upon any designated portion of the land, is void ; it being the general rule, that an execution can be extended upon such property only as the debtor might legally convey.¹

42. The principle above stated, imposing a restraint upon one tenant in common, &c., in regard to his power of alienation, is applied not merely to a conveyance of a certain portion of the whole land by metes and bounds, but also to a conveyance of his whole undivided interest in a certain portion of the lands, designated by metes and bounds. Thus, supposing A and B to be tenants in common of twenty acres, in the first place, A cannot convey to a stranger one of those acres by metes and bounds, so as to bind the co-tenant ; and, in the second place, he cannot convey all his undivided interest in one acre, designating it by metes and bounds, so as to bind his co-tenant. The rule, as generally stated by the elementary writers, would seem literally applicable to the former alone of these cases. Thus Chancellor Kent says, "one joint tenant, &c. cannot convey a *distinct portion of the estate by metes and bounds*," &c. But most of the decisions do not fall within these terms ; for, instead of attempting to convey the *whole* of any specific portion of the lands, the tenant conveys, or his creditors take upon execution, only his *undivided interest* in a specific portion. And the reasoning of the Court seems to make no distinction between the two cases. Thus, in *Bartlet v. Harlow* (s. 39), the execution was levied upon an undivided interest in a specific portion of the land designated by metes and bounds ; and the remarks of Judge Jackson, already cited, have a particular application to these circumstances. So in *Baldwin v. Whiting*,² the execution was levied upon *three undivided fourth parts of a specific part of the land*, owned by the debtor in common with others. But although there would seem, at first sight, to be a distinction between the two forms of alienation referred to, yet on principle they rest on the same ground. The true meaning of the general proposition, that one tenant in common, &c. cannot convey by metes and bounds, is, not that he cannot convey *his co-tenant's share* in a designated portion of the land, or, by his own single act, without consent of the other party, *make severance or partition*, for this seems to be taken for granted ; but that a conveyance of the whole estate in a part of the land will not pass *even his own share*. Thus, in *Porter v. Hill*, (s. 38), Judge Sewall says, "one joint tenant cannot convey a part of the land by

¹ *Bartlet v. Harlow*, 12 Mass. 348. *Baldwin v. Whiting*, 13, 57.

² 13 Mass. 57.

metes and bounds to a stranger. If he could, *his grantee would become tenant in common of a particular part with the other joint tenant*, who, in making a legal partition, might notwithstanding have the whole of the part thus conveyed, assigned as his *pur party*." Upon this principle, such grantee not only could not maintain a *real action* for the whole land, but he could not bring a *suit for partition*, claiming only a moiety; and it is in the latter form that the point has often been settled. In *Mitchell v. Hazen*, a case already cited (s. 40), the conveyance purported to pass only an undivided interest. In a later case,¹ in the same State, the deed purported to convey *so much land*, generally, by metes and bounds, making no reference to any undivided interest; and the remark of the Court, in deciding the deed to be void, that it was an attempt *to make a partition of the property*, would seem directed against the claim that *the whole title* in the land conveyed passed by the deed. So in a case in Tennessee,² where the same point was decided, the deed purported to convey the whole of a certain part of the land by metes and bounds. On the whole, it may be laid down as the true construction of the general proposition referred to, that the objection does not stand upon the form of the conveyance, purporting to pass the whole land; but equally precludes the tenant from conveying his own undivided interest in a part of the land, by a deed which purports to convey nothing more.

43. It is to be observed, that an alienation of the interest of one joint tenant, &c. either by deed or by legal process, is not for all purposes void; but will operate against him and all claiming under him *by estoppel*, and can be avoided only by the co-tenant who is injured, or those claiming under him. The assignees of the latter have in this respect all the rights of their assignor. By the assignment, all his interest passes to them, without any entry upon the land. With regard to one claiming under the tenant whose share is alienated, if he also derive a regular title from the co-tenant, perhaps he might be allowed to waive his claim under the former, and avoid the alienation by setting up his title under the latter.³

44. It has been held in Ohio by a majority of the Court, that a tenant in common might lawfully convey a part of his undivided estate by metes and bounds, but it was admitted that the point was attended with considerable difficulty, for the reasons above referred to. Judge Burnet dissented.⁴

45. In Massachusetts, by the Revised Statutes, where the whole interest of a tenant in common is more than sufficient to satisfy an execution against him, it shall be levied upon an undivided portion of

¹ *Griswold v. Johnson*, 5 Conn. 363.

² *Jewett v. Stockton*, 3 Yerg. 492.

³ *Varnum v. Abbot*, 12 Mass. 474. *Baldwin v. Whiting*, 13, 57.

⁴ *Lessee v. Sayre*, 2 Ohio, 110. The general rule is adopted in Tennessee, 3 Yerg. 492; but seems not to be in Maryland. 2 Har. & J. 421.

that interest, sufficient, according to appraisement, to satisfy the execution.¹

46. Although a tenant in common cannot alienate absolutely his share in a part of the land, yet it has been held, that where such tenant had been allowed to improve separately a certain portion of the land, he might *lease* this portion to a stranger, and the latter maintain an action for any disturbance by the other tenants.²

47. At common law, one joint tenant or tenant in common had no remedy against another for the rents of the estate, except by charging him, under an express contract, as a bailiff or receiver. Statute 4 and 5 Anne, c. 16, gave an action of account in such case. This statute is re-enacted in New York, and Chancellor Kent presumes that it has been introduced in substance into the general law of this country.³ Similar acts have been passed in Virginia, New Jersey, Mississippi, Vermont and Rhode Island.⁴

48. In Connecticut,⁵ the action of account is provided between joint tenants, &c.; except in cases where two or more are sued by one, when a bill in Equity must be brought.

49. In Massachusetts,⁶ the action of account is abolished. But a bill in Equity lies in all cases. So also an action of indebitatus assumpsit lies by one joint tenant, &c. against another, who has actually received more than his share of the profits.* But unless he has thus received an undue proportion, he is not liable to an action merely upon the ground of sole occupancy, where the co-tenant has made no claim to possession; for if he were, as each tenant is seised per my et per tout, he would be liable in the same way, by reason of occupying any particular part of the land, which would be unreasonable and absurd.⁷†

50. It is said, that if there be two tenants in common of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other may have an action of trespass against him. So, if one of two tenants in common of a park destroy all the deer.⁸

51. In Maine, one tenant in common may have trespass against another who prevents him from entering or occupying the land.⁹ In the same State, if one tenant commit waste, without forty days' notice to the others, he is liable to treble damages in trespass. In Massa-

¹ Mass. Rev. St. 464.

² Keay v. Goodwin, 16 Mass. 1.

³ 4 Kent, 369.

⁴ 1 N. J. Rev. C. 156. Missi. Rev. C. 117. Verm. L. 142. R. I. L. 193. 1 Vir. Rev. C. 111.

⁵ Con. St. 36.

⁶ Mass. Rev. St. 500, 695. Brigham v. Eveleth, 9 Mass. 538. 9 Pick. 34.

⁷ Sargent v. Parsons, 12 Mass. 149.

⁸ Co. Lit. 200 a.

⁹ Maine L. 1837, 442.

^{*} So in New York, 1 Rev. St. 750; otherwise in Tennessee, 2 Yerg. 384.

[†] Profits received by one tenant give the other an *equitable lien* upon the land. The claim is *personal* on both sides, to be paid from the personal estate of the former, and to the personal representative of the latter, not to his heir, devisee or grantee. 4 Paige, 336.

chusetts, there shall be thirty days' notice. The same penalty for waste committed pending a process for partition.

52. It is said, if there be two tenants in common of a dwelling house, and they severally furnish and occupy different apartments, one co-tenant has no right to disturb the other's occupation by removing his furniture; and trespass would clearly lie for such removal.¹

53. In Illinois a statute provides, that for assuming and exercising exclusive ownership, taking away or destroying the common property, lessening its value, injuring or abusing it; one tenant in common, &c. may have trespass or trover against another.²

54. It was held in an ancient case, that if there be two tenants in common of a wood, and the one leases his part to the other for years, if the lessee cuts down trees and does waste, he will be punished for a moiety of the waste, and the lessor may recover a moiety of the place wasted.³

55. But this doctrine seems to have been overruled in a subsequent case,⁴ in which it was held, that such lessee cannot be regarded as standing in a less favorable light than he would have done if no lease had been made; that if one tenant in common misuse the common property, he is liable as for a misfeasance, but some injury must be done to the inheritance, as by cutting trees which are unfit to be felled. Otherwise he does nothing more than take the fair profits of the estate. In this case, the trees were proper to be cut, and upon this ground, it was distinguished by counsel from the case in Moore, above referred to.

56. In many of the States, a remedy has been given by statute for one tenant in common against another, who commits waste upon the common property.*

57. In New Jersey,⁶ when several hold lands together, and none knows his or her several part, one may have a writ of waste against another; and when the suit comes to judgment, the defendant shall be required to take a certain part of the land to be assigned by the sheriff and jury, or give security that he will take nothing more from the land than the other tenants take. If the defendant elect to take his part in a certain place, an assignment shall be made to him in the place wasted, making no allowance for the waste done; but if he does not thus elect, or if the amount of waste exceed the value of his proportion of the land, the plaintiff shall recover damages.

58. In Rhode Island,⁶ a tenant in common, &c. who commits waste, forfeits double the amount of the waste committed.†

¹ *Keay v. Goodwin*, 16 Mass. 3. ¹ *Smith's St.* 137-8. Mass. Rev. St. 630.

² *Illin. Rev. L.* 474.

² *Cruise*, 356. Moo. 71, pl. 194.

⁴ *Martyn v. Knowllys*, 8 T. R. 145.

¹ *N. J. Rev. C.* 209.

⁶ *R. I. L.* 199.

* As to the remedy in Massachusetts and Maine, see p. 451. It also exists in New York. 2 Rev. St. 334. In Kentucky, it seems to be limited to parceners. 1 Ky. R. L. 562. So in Ohio, St. 1831, 258.

† As to injuries by tenants in common, and the liability of one for another, see 8 Greenl. 138.

59. The general rule is, that the possession of one joint tenant, &c. is that of the others also; that is, the possession of one is not *adverse* to the title of the others, but *amicable* and in support of the rights of all. But still one tenant may by special acts *disseise* another, and by length of possession gain an adverse title.

60. Where one tenant in common received all the rents for twenty-six years, it was held, that this was a mere failure to account, and not an ouster or expulsion, which could be effected only by an actual *disseisin*.¹

61. But where one tenant in common had sole and undisturbed possession for thirty-six years, without any account, or any claim or demand by the other, or any one claiming under him, Lord Mansfield left it to the jury to say, whether there was not sufficient evidence to presume an actual ouster, and they found a verdict for the defendant, which was sustained by the Court. Lord Mansfield remarked, that the terms *actual force* did not imply real force, or a turning out by the shoulders. A man may come in rightfully, and hold over adversely, and such holding over is equivalent to actual ouster. The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion, because it is not adverse, but in support of their common title; and by paying him his share, he acknowledges him to be co-tenant. Nor is a refusal to pay sufficient, without denying his title; but if, upon demand of payment, the tenant in possession deny the other's title and claim the whole, the subsequent possession is adverse.²

62. It has been held in England, that where one tenant in common levied a fine of the whole estate, and took the rents and profits afterwards without account for nearly five years, this was no evidence upon which the jury should find an ouster at the time of the fine, against the justice of the case, and in aid of gross fraud; that the fine was no ouster, but the Court might consider it as rightfully and legally made, and intended to operate only on the party's own share of the estate.³

63. But it has been decided in New York, that where one tenant in common undertakes to convey the whole land, the grantee shall not be understood to enter as a tenant in common, but the Statute of Limitations will run in his favor against the co-tenants.⁴*

64. With regard to suits brought by tenants in common against strangers for recovery of the land, the common law rule is, that

¹ *Fairclaim v. Shackleton*, 5 Burr. 2604. 8 Pick. 376.

² *Doe v. Prosser*, Cowp. 217. 4 S. & R. 537. (4 Yerg. 104. 13 Pick. 251. 1 M'Cord, 131. 5 Watts, 146).

³ *Peaceable v. Read*, 1 E. 568.

⁴ *Clap v. Bromaghann*, 9 Cow. 551. 5 Pet. 444. 10 Pick. 161.

* By the Revised Statutes, ejectment does not lie, without an actual ouster or total denial of right. 2, 306-7.

having several titles, they must bring separate actions. But in Vermont, Connecticut, and Virginia,¹ they may sue jointly.

65. In Rhode Island and Massachusetts, all the tenants or any two may join, or any one sue alone. In Connecticut, if the plaintiff grounds on the title of all the tenants, he recovers for their benefit, and his possession will be theirs. If two join and one is non-suited, the other may recover the whole.²

66. In Missouri,³ it is held that tenants in common cannot join in ejectment.

67. In Tennessee,⁴ it is the uniform practice for tenants in common to declare in ejectment on a joint demise, and recover a part or the whole of the land according to the evidence. If they join in suit and one is barred by the Statute of Limitations, this is no bar to the rest.

68. It has been already stated (p. 445), that joint grantees of public lands hold as tenants in common. The question has been raised whether, on account of their peculiar title, such grantees can, like other tenants in common, bring ejectment.

69. Although not distinctly decided, it is said that it may be assumed, that ejectment may be brought by one proprietor of lands granted by the State, when the others have actually taken possession and divided to themselves all the lands included in the limits of the grant; though this action would lie, only where the proprietors refuse to divide according to law, and after demand. But there is more difficulty in the application of these principles and extending this remedy to those who are directed, as agents or trustees, to take charge of the rights of land which are usually denominated *public rights*. The nature of their interest does not permit that it be enjoyed in common with the other proprietors. In regard to them, it is only *the use* which is appropriated, and not the freehold. Statutes provide that such trustees may *lease* the lands. But it would be of little avail to them, to take possession of a fractional part of every lot or tenement in a town; and it would be impossible to lease them to any profit or advantage. Moreover, if such trustees are to be regarded as tenants in common, inasmuch as one of such tenants, in Vermont, in a suit by himself alone may recover the whole land; and as public lands are excepted from the Statute of Limitations, it would follow that although the other tenants were barred by the statute, the trustees might still recover the whole land, in part for the benefit of the others, and not merely their own share. Upon these grounds, no action of ejectment can be maintained by such trustees, until a divi-

¹ Hicks v. Rogers, 4 Cranch, 165. Verm. L. 96. 1 Swift, 103. Vir. L. 1823, 27. 12 Pick. 38. 1 M'Cord, 161. 2 Bay, 457.

² R. I. L. 208. 1 Swift, 103. Mass. Rev. St. 611.

³ Wathen v. English, 1 Misso. 746.

⁴ Barrow v. Nave, 2 Yerg. 228.

sion or allotment is made. But when there is no actual location, ejectment will lie to recover the public lands.¹

70. One joint tenant, &c. can compel the others to unite in the expense of necessary repairs to a house or mill; but not of repairs made upon other things—as, for instance, a fence. The writ *de reparatione facienda* lay at common law in such cases, by one tenant against others. To sustain the action, there must be a request and refusal to join, and the expenditures must have been previously made.²

71. If one tenant make or authorize *new erections*, though with the knowledge of the other, he cannot claim to hold them exclusively, till reimbursed.³*

CHAPTER LV.

TENANCY IN COMMON, ETC.—PARTITION.

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|---|------------------------------|
| 1. Methods of partition. | 15. Illinois. |
| 2. Statutes of the several States concerning. | 16. Indiana. |
| 3. In the New England States. | 17. Missouri. |
| 9. New York. | 18. Kentucky. |
| 10. Pennsylvania. | 19. Ohio. |
| 11. New Jersey, Alabama and Mississippi. | 20. Virginia. |
| 12. Maryland. | 21. North Carolina. |
| 13. Delaware. | 22. South Carolina. |
| 14. Tennessee. | 23. Georgia. |
| | 24. Miscellaneous decisions. |

1. SOME remarks have already been made, in regard to the severance of a joint tenancy, &c. by the acts of the parties themselves. Partition may also be obtained by application to the Legislature or by legal process. It is to be presumed that the old English statutes already referred to, (p. 436), providing a *writ of partition*, have been generally re-enacted or adopted in this country. In practice, however, these remedies are, to a great extent, superseded, by the more summary and convenient methods of *petition* to the Courts of common law, of Chancery, or of Probate. The jurisdiction of Chancery upon the subject is well established by a long series of decisions. But

¹ University, &c. v. Reynolds, 3 Verm. 554-5-6.

² 4 Kent, 369-70. 9 Pick. 31.

³ 3 Watts, 238.

* There is a peculiar provision in Virginia, that joint tenants, &c. may give a *single joint vote*, where the whole estate entitles to a vote, but a share does not. Vir. St. 1830, 16-7.

Equity does not interfere, unless the title be clear, and never where the title is denied or suspicious, until opportunity has been had to try the title at law.¹

2. The statutory provisions of the several States, in regard to partition, are very precise and numerous. With a general similarity, there are still points of difference among them, which require a distinct summary view of the law in each State. It will be seen, that in Kentucky, and in the three States of Alabama, Mississippi and New Jersey, there are respective peculiarities deserving of special notice. The methods of partition among *coparceners* or heirs, which, however, have very little to distinguish them from that between other joint owners, will be more particularly referred to under the title of *Descent*.

3. In Massachusetts,² joint tenants, &c. may have partition by writ or by petition. The shares of the petitioners shall be set off, and the residue of the land remain undivided. A remainderman or reversioner cannot have partition;³ nor any tenant for years, of whose term less than twenty years is unexpired, as against a tenant of the freehold. But all tenants for years may have partition between themselves; which, however, shall not bind the landlords or reversioners, when the terms end. The petition sets forth the titles of all persons interested, and who will be bound by the partition, whether having a freehold or term, a present or future, a vested or contingent estate. A reversioner, &c. after a life estate or term, is a party interested, and entitled to notice. Unknown parties who are interested shall be notified by public advertisement. Where one not named in the petition appears and defends, the petitioner may deny his title. If the petitioner shows himself entitled to partition, an interlocutory judgment is rendered accordingly, and commissioners are appointed to make partition. If there are several petitioners, their shares may be set off together or separately at their election. If a division cannot be made without damage to the owners, a disproportionate share may be assigned to any one who will accept it, on his paying or securing a sum requisite to equalize the value; or the exclusive possession may be assigned to the parties alternately for certain specified times, according to their respective interests. In the latter case, the occupant for the time being shall be liable to the other owners for any injury to the land, like a lessee without express covenants. For any injury by a stranger, the occupant may recover damages like a lessee; and he and the other tenants may recover jointly for any further damage for which lessors might sue. The final judgment, confirming and establishing the partition, shall be conclusive as to all rights, both of property and possession, of all parties and privies to the judgment,⁴ including all who might have appeared and answered; excepting, however,

¹ 4 Kent, 364. 1 N. J. Rev. C. 89.

² See 12 Pick. 374; 13, 333; 8, 376.

³ Mass. Rev. St. 618-2.

⁴ See p. 464.

any joint owner absent from the State, who is allowed three years to obtain a new partition. One claiming the land in severalty is not bound by a judgment of partition, not having appeared as a respondent. If one, who has not appeared and answered, claim the share assigned to or left for any of the supposed part owners, he shall be bound by the judgment, so far as it respects the partition and assignment of the shares, as if he had been a party; but may still bring a suit for the share which he claims, as a specific portion of the land, against the party to whom it was assigned or left. Where two or more persons appear as respondents, claiming the same share of the land, their relative title may be left undecided, except so far as to determine which of them may defend, and may be settled in a subsequent suit between them. A judgment in the partition suit, that either of the opposing respondents is not entitled to a share, shall be binding upon him, so far as it respects the partition and assignment of shares; but he may still maintain a subsequent suit against the other claimant. If any person, who has not appeared and answered, claims a share of the land, he shall be bound by the judgment, so far as the partition is concerned; but he may still sue each of the other tenants for his share, each being liable for a proportion thereof.¹ Where a party dies before partition and a share is still assigned or left him, his heir or devisee may claim the original share (undivided) though made a party to the petition. Eviction of any tenant, from the share assigned or left him, by paramount title, shall entitle him to a new partition of the residue. Any person, having a lien upon the share of a tenant, shall be bound by the partition, but retain his lien upon the portion allotted to his debtor.

4. In New Hampshire,¹ "any person interested with others" in real estate, "where there is no dispute about the title," may obtain partition by application to the Judge of Probate. If a division would be injurious, the whole may be assigned to one of the petitioners, he paying or giving bond for the amount of the shares of other parties.

5. In Rhode Island,² where persons own together in fee, or where one has a particular estate, in connexion with others holding a fee or a freehold, a writ of partition lies. The Court ascertain the rights of the parties, and partition is made conformably. The proceeding shall not affect any reversion or remainder.

6. In Connecticut,³ the writ of partition is expressly provided. Provision is also made, that the guardians of minors, with the aid of persons appointed by the Probate Court, may make partition.

7. In Vermont,⁴ partition is made, upon petition, by commissioners. If the land cannot be conveniently divided, an assignment of

¹ See 11 Pick. 311; 12, 56.

² N. H. L. 344.

³ 1 Verm. L. 197-203.

⁴ R. I. L. 206.

⁵ Con. St. 293, 351.

the whole may be ordered to one of the parties, he paying such sum and in such manner as the Court shall direct. If no party will accept the whole, the land shall be sold. The sale shall bind the owners and all claiming under them. The partition shall be valid, though one owner, without the knowledge of the others, had previously conveyed his interest, or though he sell it pending the petition, and though the grantee of one of the tenants, whose conveyance was not recorded, was not made a party. And a partition in such case shall inure to the benefit of the legal owner. Three years are allowed, to any party without the State and not notified, to avoid the partition for good cause.

8. In Maine,¹ a writ of partition is authorized, and also an application for this purpose to the common law Courts, who shall order partition by a committee. Any party aggrieved, if absent from the State, and not notified, may within three years have a new partition upon complaint. The whole may be assigned to one, if necessary.

9. In New York,² any joint tenant, &c. may petition the Court for partition, or, if necessary, a sale of the land. The petition shall describe the premises, set forth the rights of all persons, having either present or future, vested or contingent interests therein, and be verified by affidavit. Every person interested may be made a party. If any party or his interest is unknown, uncertain or contingent, or if the title to the fee depends upon an executory devise, or the remainder is contingent—these facts shall be stated. Creditors having a lien need not be made parties; nor shall such lien be affected, except that it shall attach only to such part of the land as is set off to the debtor, and be subject to his share of the costs of partition. After notice of the petition, any party interested may appear as a respondent, and the proceedings shall be according to the usual course of a suit at law. A final judgment or decree binds all parties named in the proceedings, and having at the time any interest in the premises, as owners in fee or for years, or as entitled to the reversion, remainder or inheritance after the termination of any particular estate; or as having a contingent interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower. Also all persons interested but unknown, to whom public notice has been given as provided. But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or for life, in the whole of the premises. In case of partition by Equity jurisdiction, if partition will prejudice some of the parties, compensation shall be decreed from the others. Whenever there is a denial of co-tenancy, an issue shall be formed and tried by jury, and the respective rights of the parties ascertained. The defendants may plead, that the petitioner or petitioners were not in possession of the land. One defendant may deny the title of another, and an issue shall be made to try

¹ 1 Smith's St. 145-50.

² 2 Rev. St. 617. 4 Kent, 365.

it. New parties may be admitted, who have become subsequently interested, or known to be so. The Court, having ascertained the respective rights of the parties by default, plea or verdict, shall declare them, and decree partition accordingly, with a reservation, however, of the rights of those tenants whose interests have not been ascertained. Partition is made by commissioners. The respective shares shall be designated by permanent monuments. If the land cannot be properly divided, it may be sold by order of Court, on such credit as they may direct, the price to be secured by bond, and mortgage of the land. Provision is made for ascertaining incumbrances upon the land, and when they exist, if the premises are sold, they shall be first satisfied from the proceeds; and in case of any dispute in relation to them, the Court shall proceed to try their validity. The Court, in their discretion, may order that any life interest in the land be sold, or otherwise. If sold, they shall direct a sum in gross to be paid to the party, if he formally assent; if not, an investment shall be made for his benefit in certain designated amounts, depending upon the nature of the interest. No commissioner or guardian shall be a purchaser. The Court shall decree conveyance by the commissioners; which shall bar all parties named and all unknown, if the required notice has been given.

10. In Pennsylvania,¹ provisions are made with regard to a writ of partition. When the inquest appointed to make partition are of opinion that it cannot be done without injury, they shall return an appraisement, and the Court may adjudge the whole to such tenant or tenants as will take it at the valuation, and the sheriff shall execute a conveyance accordingly. But the land shall be subject to a lien for payment of the price to the other tenants. If neither of the parties will accept the whole land, it shall be sold by the sheriff, and the proceeds brought into court and distributed. Where judgment is rendered by default upon a writ of partition, any party interested may obtain a reversal for good cause within one year therefrom. Where equal partition in value cannot be made of any share or part, the sheriff and inquest may equalize, by awarding a certain sum from one to another, for which there shall be a lien on the land. Where there are several defendants to a writ of partition, the Court shall award a mutual partition among them, as well as to the plaintiff, unless all of them declare a wish to the contrary.

11. In Mississippi, Alabama and New Jersey,* any coparcener, joint tenant or tenant in common may make application for partition. The Court shall ascertain the number of joint owners, and appoint commissioners, with directions to divide the land into a corresponding number of shares. Where the bounds of any tract or tracts to be

¹ Purd. Dig. 682-5. (See 5 Watts, 113).

* Chancellor Kent says, that in this State, according to the bill reported by Mr. Scott, the reviser, in 1835, partition was to be in just judgment and assignment, and not by lot. 4 Kent, 364 n.

divided are controverted, if the controverted part is valuable, the commissioners shall separate it from the residue, and so make partition as to attach to each share a portion both of the controverted and the uncontroverted part of the land. The parts or shares and the lots laid off shall be numbered, and partition afterwards made by balloting or drawing of tickets in the manner of a lottery; at which, on the application of any party, a judge or justice shall be present. The whole proceedings are recorded and are effectual to make partition of the land. The rights of any one having a paramount title to the land are not affected. In New Jersey, the act does not apply to lands of general proprietors of the Eastern or Western divisions of the State. In Alabama, minor devisees or heirs, holding jointly, may have partition on application to the Orphan's Court. In Mississippi, a partition may be re-examined in Chancery.¹ In New Jersey, joint tenants, &c. may be compelled to make partition, like coparceners, by writ of partition. Such process shall bind only parties, their heirs, &c. where either or both are owners of a less estate than the fee. If *the tenant to the action* or defendant does not appear to defend, the Court will proceed to make partition, which shall conclude all persons whatsoever, whatever right, &c. they have or claim, "although all persons concerned are not named in any of the proceedings, nor the tenant's title truly set forth;" with a saving, however, of one year, or one year from the removal of any disability, for the purpose of setting aside the partition. Where an undivided share of the land is leased, the lessee shall be tenant of the portion allotted to the landlord, and the latter shall warrant and make good the title, according to his original obligation. If the demandant is himself a lessee of the tenant, the relation shall still continue after partition. If a partition would be injurious, the commissioners may make sale of the land, which shall be valid against the owners and all claiming under them, but no other persons. The proceeds shall be paid to the parties, or, if one is out of the State, invested. Where one or more of joint tenants, &c. are minors, the Orphan's Court may order partition.²

12. In Maryland,³ the Chancellor may order partition of the estates of infants, idiots, &c. Joint tenants, &c. holding *by devise*, may have partition by application to Court. Commissioners are appointed, and division made as on a writ of partition.

13. In Delaware,⁴ partition may be obtained by application to the Chancellor, who, after notice to parties interested, shall decree partition, after ascertaining the respective shares of the parties. Commissioners are appointed, who make return of their doings, accompanied with a survey of the land. If all the owners join in petition,*

¹ Missi. Rev. C. 232. Aik. Dig. 332-6. 1 N. J. Rev. C. 89.

² 1 N. J. Rev. C. 299, 597. N. J. St. 1835-6, 395. (See 2 Green, 132).

³ 2 Md. L. 1794, ch. 60, s. 8; 1797, ch. 114, s. 5. 5 Ib. 1814, ch. 109, s. 5-6.

⁴ Del. St. 1829, 168; 1833, 242; 1837, 72.

* See p. 464.

no notice is requisite. If a division would be attended with injury and loss to the parties, the commissioners shall make a valuation of the property, and the Court will order a sale by a trustee appointed for that purpose. Such sale shall pass the estate, subject, however, to paramount claims. The proceeds, with the same exception, are paid over to, or invested for the benefit of, the respective parties. Instead of a sale, one or more of the tenants may take the property at the valuation, either paying the price immediately, or entering into a recognisance with surety for it in Chancery, in such manner as the Chancellor shall direct. But no such assignment to one or more shall be made, where there are conflicting claims to it.

14. In Tennessee,¹ public notice is given by advertisement before presenting a petition for partition. No other notice is requisite, and the partition shall be forever binding on all and every person or persons who shall or may have claim or title to the land as tenant in common, &c. Contrary to the general practice of giving jurisdiction to the Courts of Probate in case of descent, partition may be made of real estate held by the heirs of an intestate, by application to the common law Courts. The commissioners, appointed to make partition, may charge the more valuable dividend or dividends, with such sum or sums as they shall judge necessary to be paid to the dividend or dividends of inferior value, in order to make an equitable division. The return of the commissioners is accompanied by a survey when necessary, and recorded, and the return and appropriation shall be binding among and between the claimants, their heirs, &c.²

15. In Illinois,³ partition may be had by application to Court, through commissioners. It is provided that their report "shall be conclusive to all parties concerned." But another chapter of the Revised Statutes provides that reversioners, &c. shall not be affected. If necessary, the land shall be sold, and the sale will bind the owners and all claiming under them.

16. In Indiana,⁴ concurrent jurisdiction for partition is given to the Courts of law and of Equity. It is made through commissioners. If necessary, the land is sold. They to whom partition is made release of record their title to the residue of the land.

17. In Missouri,⁵ partition may be made on petition, and a sale in case of necessity. No commissioner or guardian shall purchase. Many of the provisions are similar to those in New York.

18. In Kentucky,⁶ where all or a part of joint owners have an inheritance, the writ of partition lies. Reversioners, &c. shall not be affected. Provision is made for partition, by application to certain *standing commissioners*, appointed generally for this purpose.* Par-

¹ 1 Scott, 641.

² Illin. Rev. L. 238-9, 473.

³ Misso. St. 422.

* In this respect, the law of Kentucky seems to be peculiar to that State. In all the other States, the application is made to some Court or a Judge thereof.

⁴ 1 Scott, 385-6.

⁵ Ind. Rev. L. 387-90.

⁶ 2 Ky. Rev. L. 876, 1070.

ticular provision is made for the case, where some of the parties are non-residents. It would seem, in this case, that no partition will be made, unless there is a *contract* to that effect. But in the case of residents no contract seems necessary. If no division can be had, either party may enter his proportion of the land with the commissioners, and save a forfeiture by paying the tax thereon.

19. In Ohio,¹ partition may be effected by petition to the Courts of law. There may be a sale, if necessary.

20. In Virginia,² where a part of joint owners are unknown, partition may be had in Chancery, reserving to the unknown proprietors the amount of their shares. Where defendants are either absent or unknown, they may for cause rescind the partition within three years. Partition shall not affect persons not named, unless they claim as joint tenants, &c. with those who are named.

21. In North Carolina,³ partition is obtained upon petition. The commissioners may charge the more valuable dividend or dividends with such sum as may be necessary to make an equitable division; which, however, shall not be paid by any minor tenant till he comes of age. But his guardian shall pay it upon receiving assets. A Court of Equity may order a sale, where partition would be injurious. So also on the application of joint tenants, &c. stating that their land is required for public uses. The proceeds belonging to any party under disability shall be invested for his benefit. Where land jointly owned is subject to dower, and the tenants and the party claiming dower apply together for a sale, the Court of Equity may order such sale, and that a third part of the proceeds be secured for the benefit of the latter, or ascertain the value of the life estate and decree payment of it to her absolutely.

22. In South Carolina,⁴ joint tenants, &c. may apply for a *writ of partition*, which shall issue to commissioners.

23. In Georgia, the statute, after reciting that it would be inconvenient to pursue the method of dividing lands by writ of partition, as practised in Great Britain, authorizes parties to apply to the Court for a writ of partition, to be devised and framed according to the nature of the case. The writ issues to *partitioners*, who shall proceed to make a division. One year is allowed, or, in case of disability, one year from its removal, for a party interested to set aside the partition for good cause.⁵

24. Where one is a tenant in common in his own right; he is not debarred from bringing a suit in partition, simply because he is a trustee for others of other parts of the land.

25. In New York, where there is a vested estate, with contingent remainders over in trust to persons not *in esse*, and all from whom such

¹ Ohio St. 1831, 254.

² 1 N. C. Rev. St. 450-3.

³ Prince, 541-2.

⁴ Va. St. 1830, 99.

⁵ 2 Brev. 102.

after comers can spring are before the Court, a partition may be decreed. If this were not so, then in every case where there is a settled estate, with remainders to persons who may come in esse, there never could be a partition. The limitations over are not affected by a partition or sale. They are protected; and attach to the individual shares, which, by the decree, are preserved in trust according to the will.¹

26. A decree for a sale of land held in common can in no case be made, till after a reference to a master, to inquire as to general liens or incumbrances upon the undivided shares.²

27. A purchased from the commissioners of forfeitures in New York an undivided half of the rent and reversion of a certain lot of land, which was under lease to B. B, at the time of the purchase or soon after, was in possession of the whole lot, claiming under the lease, and also claiming to own the other half of the rent and reversion. A brings a bill for partition against B. Held, there was no such tenancy in common between A and B, during the continuance of the lease, as would entitle them to partition; that when B, being in possession under the lease, acquired the rent and reversion of one half of the land, the tenancy as to that half was merged and the rent extinguished; and that, if the lease had for any cause become forfeited, A must first recover possession of his half of the land by entry or action, before he could sustain a bill for partition.³

28. The wife of a husband, tenant in common, is not a necessary party to a suit for partition. If partition be made, her right of dower attaches to the share allotted to the husband. This results as a matter of course, without any decree or order of the Court; and consequently without her being before the Court as a party. Where a sale, instead of a partition, becomes necessary, it is immaterial whether the wife is or is not joined in the suit; because a decree for sale and conveyance will not bar her right of dower. The statute, (of New York) regulating partition, does not expressly provide that a sale of the husband's land shall defeat the wife's dower; and nothing so materially affecting her legal rights ought to be taken by implication. The statute provides merely, that where there is *an existing estate* in dower or by the curtesy, a certain gross sum shall be paid to the tenant, or a share of the proceeds put out at interest for his or her benefit, in satisfaction of the right taken from them by the sale. But an inchoate right of dower is a mere possibility, and not an estate, and though the statute speaks of all persons *interested* in the estate, this term must be construed by preceding sections, which point out the kind of interest intended.⁴

¹ *Cheesman v. Thorne*, 1 Edw. 629. *Wills v. Slade*, 6 Ves. 498. But see 2 N. Y. R. S. 322. (*Manners v. Charlesworth*, 1 Mylne & K. 330).

² *Wilde v. Jenkins*, 4 Paige, 481.

³ *Lansing v. Fine*, 4 Paige, 639.

⁴ *Matthews v. Matthews*, 1 Edw. 567. (See 3 Paige, 653).

29. Upon the principle that Courts of Equity, in regard to trusts, adopt the rules of law applicable to legal estates ; in a partition suit, where all the cestui que trusts are parties, if by the death of the surviving trustee the trust has devolved upon the Court, the master who sells will be appointed a trustee, for the purpose of passing a legal title.¹

30. It has been held, that partition may be presumed from a long several holding by heirs of one ancestor. So in North Carolina, that partition without deed is valid, if made on the land. And in New York, if followed by separate possession.²

31. But in Massachusetts, a parol partition by joint tenants, &c. is void, being within the Statute of Frauds ; and notwithstanding a several occupancy, they remain jointly seised ; for a partition by deed cannot be inferred from a several possession in fact. Such partition is not a question of law, but of fact, for the jury.³

32. On the other hand, an unsealed agreement between the tenants that they will continue to hold in common, is no bar to a suit for partition ; for such a contract cannot affect the title to land.⁴

33. Lands lying in common and undivided are subject to partition, though the proprietors are a body politic, and have immemorially exercised the exclusive right, at their corporate meetings, of dividing, managing and improving the lands. So, if the use of lands is held in common, while the legal title is in a corporation, the *cestuis que use* may have partition.⁵ (See p. 454).

34. Where applicants for partition own the whole land, it will not be granted.⁶ (Otherwise in Delaware. See p. 460).

35. It is said, in Massachusetts, a petition for partition, though founded on statute, is in the nature of a *real action*. The question in issue is one of *legal title*, and not of mere equitable interests.⁷

36. It is said, that the process for partition lies for those only who are actually seised.* But if a tenant has not been wrongfully dispossessed, or excluded from taking the profits, or has not lost his right of entry by the continued occupation of his co-tenants ; he may have partition, though not in actual possession.⁸

37. It has been seen, how far the statutes of the several States render a judgment in a partition suit binding and conclusive upon

¹ Cushman v. Henry, 4 Paige, 345.

² McCall v. Reybold, 1 Harrington, 146. Cam. & Nor. 82. 14 Wend. 619.

³ Porter v. Perkins, 5 Mass. 233. Porter v. Hill, 9 Mass. 34. (See 3 Pick. 396).

⁴ Black v. Tyler, 1 Pick. 150.

⁵ Mitchell v. Starbuck, 10 Mass. 5. (See 3 Pick. 396).

⁶ Swett v. Bussey, 7 Mass. 503.

⁷ Blanchard v. Brooks, 12 Pick. 56. (1 Gill. & J. 324).

⁸ Bonner v. Prop'rs. &c. 7 Mass. 475. Barnard v. Pope, 14, 434. Clapp v. Bromagham, 9 Cow. 530. In Maine, a right of entry is sufficient. 3 Fairf. 320. And see 5 Cow. 295. 1 Gill. & J. 324.

* The same rule prevails in Equity. 1 Gill. & J. 503.

parties interested. Independently of special provisions, it has been held in Massachusetts, that such judgment binds only *the right of possession*, and not *the right of property*.¹ *

38. It is a bar to another petition for the same object, if the parties and the title put in issue or necessarily decided are the same. But where a former partition was only of a part of the land held in common, and all the co-tenants were not parties to the suit, the judgment is no bar to a new petition for partition of the whole land, to which all the tenants are made parties.²

39. Where a disseisor of one tenant in common has obtained partition, the tenant may either recover possession of his undivided share, treating the partition as void, or may affirm it, and recover the portion of the land assigned to his disseisor.³

40. It is held in Massachusetts, that where tenants in common hold a mill, dam and stream as one entire tenement, one cannot have partition of the dam and water alone.⁴

41. Whether a mill-dam and mill-stream are a subject for partition by metes and bounds, qu.⁵

42. In Vermont, a saw-mill, mill-yard, mill-pond, and the utensils of the mill, are held not to be proper subjects of partition. But in Maine it has been held, that there may be partition of a mill and mill privilege, though it seems it may be otherwise made than by metes and bounds.⁶

43. In Vermont, partition cannot be had where the property is such, that its separate parts cannot be relatively valued, as in the case of an *ore bed*. Nor will a court of law order a sale or an assignment to one tenant. The proper application is to the Court of Chancery.

¹ *Pierce v. Oliver*, 13 Mass. 211.

² *Colton v. Smith*, 11 Pick. 311.

³ *Miller v. Miller*, 13 Pick. 237.

⁴ *Brown v. Wood*, 17 Mass. 68.

⁵ *Ib.*

⁶ *Brown v. Turner*, 1 Aik. 350. *Hanson v. Willard*, 3 Fairf. 142.

⁷ *Conant v. Smith*, 1 Aik. 67.

* But in New York it is said, though such judgment *does not change the possession*, yet in a future trial of the title it is conclusive. 9 Cow. 530.

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